TRAINING BULLETIN: WINTER, 2002

COMMITTEE FOR PUBLIC COUNSEL SERVICES
TRAINING UNIT
44 BROMFIELD STREET, BOSTON, MA 02108

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I. INDIGENT DEFENSE NEWS

CPCS JURY SKILLS PROGRAM APRIL, 2002

April 8-12, 2002 from 9:00 a.m. to 5:00 p.m., in the Boston CPCS office. This five-day intensive training seminar is open to 24 private and public counsel division attorneys, who will work in small groups coached by experienced trial attorneys. Utilizing mock cases, trainees will improve their skills in opening statements, cross-examination and impeachment, direct examination, and closing argument. Professional actors will perform as witnesses for the cross-examinations. Short lectures will precede the small group exercises and demonstrations by experienced faculty will follow. Evaluations of the previous nine courses have been uniformly enthusiastic. The course is based on the two-week course offered by the National Criminal Defense College in Macon, Georgia, which costs over $1,400. We ask those attending to contribute just $100 to the CPCS Training Trust.

Acceptance into the program will be based on a number of factors, including an effort to obtain geographic and other diversity. To apply for this training opportunity, send your statement of interest to Training Director, CPCS Training Unit, 44 Bromfield Street, Boston, MA 02108 or e-mail to ktm@cpcs1.cpc.state.ma.us. State how long you have practiced criminal law; describe the number and types of jury trials you have undertaken, including the nature of the charges and whether the trials were in Superior or District Court; list the bar advocate programs to which you belong and whether you are a member of any other CPCS certification list (e.g., juvenile, mental health, CAFL); and provide any other information you consider pertinent. Applications must be received by March 1, 2002. **Participants are expected to attend the entire program. Keep your calendars clear.**

CPCS ANNUAL TRAINING CONFERENCE

The 2002 CPCS Annual Training Conference will be held on Friday, May 10, 2002, from approximately 8:30 a.m. to 5:00 p.m. at the Worcester Centrum Centre in downtown Worcester. Criminal Law, Children and Family Law, Appellate and Mental Health programs will be offered.

The cost for the conference is a $95.00 contribution to the Training Trust. This entitles participants to attend all seminars and the awards luncheon, and to receive conference materials from all of the programs offered. **Enrollment is limited and available slots will be filled on a first-registered, first-served basis.** The conference is only open to attorneys who accept assignments through CPCS. Please use the registration form posted at CPCS's web site,

http://www.state.ma.us/cpcs/training.

CPCS ACCEPTS NOMINATIONS FOR AWARDS

The **"Edward J. Duggan Award for Outstanding Service"** is given to both a Public Defender and Private Counsel attorney and is named for Edward J. Duggan, who served continuously from 1940 to 1997 as a member of the Voluntary Defenders Committee, the Massachusetts Defenders Committee, and the Committee for Public Counsel Services. The award has been presented each year since 1988 to the public defender and private attorney who best represent zealous advocacy --- the central principle governing the representation of indigents in Massachusetts.

The **"Thurgood Marshall Award"** recognizes a person who has made significant contributions to the quality of the representation we provide to our clients.

The **"Jay D. Blitzman Award for Youth Advocacy"** is presented annually to a person who has demonstrated the commitment to juvenile rights which was the hallmark of Judge Blitzman's long career as an advocate. Judge Blitzman was a public defender for twenty years and, in 1992, he became the first director of the Youth Advocacy Project. The award honors a person, who need not be an attorney, who has exhibited both extraordinary dedication and excellent performance in the struggle to assure that children accused of criminal conduct or are otherwise at risk are treated fairly and with dignity.

The **"Paul J. Liacos Mental Health Advocacy Award"** is presented annually to a public defender or private attorney whose legal advocacy on behalf of indigent persons involved in civil and/or criminal mental health proceedings best exemplifies zealous advocacy in furtherance of all clients' legal interests.

The **"Mary C. Fitzpatrick Children and Family Law Award"** is presented annually to a public or private attorney who demonstrates zealous advocacy and an extraordinary commitment to the representation of both children and parents in care and protection, children in need of services, and dispensation with consent to adoption cases. The award was named for Judge Fitzpatrick in recognition of her longstanding dedication to the child welfare process and the well-being of children in the Commonwealth. Judge Fitzpatrick has long been an advocate for the recognition of rights of children and parents as well as for the speedy resolution of child welfare matters.

Nominations: Nominations for these awards should be submitted to William J. Leahy, Chief Counsel, CPCS, 44 Bromfield Street, Boston, MA 02108, **no later than March 19, 2002**. The Committee will present the awards at the CPCS Training Conference on Friday, May 10, 2002.

2001 LEGISLATIVE SESSION, CRIMINAL LAW MATTERS

Victim Testimony at Parole Board Hearings. By St. 2001, ch. 31, a new section, §133E, was added to G.L. c.127: violent crime or sex offense victims, and parents or legal guardians of such minor victims, may testify in person at the parole hearing of the perpetrator or may submit written testimony to the parole board. Check the statute for its definitions of "sex offense" and "violent crime."

Motor Vehicle Violations: Written Warnings. By St. 2001, ch. 67, the Legislature removed from G.L. c.90C, §2, the requirement that the Registrar of Motor Vehicles hold a hearing and, if appropriate, suspend an individual's license to operate a motor vehicle if such individual has received three written warnings of an automobile law violation within a twelve

month period.

Act to Ensure Unemployment Insurance for Victims of Domestic Violence. See St. 2001, ch. 69, approved August 11, 2001, amending G.L. c. 151A, §25 and §30.

Open Container Law, G.L. c. 90, §24I, applies to drivers of motor homes and recreational vehicles. See St. 2001, ch. 91. Violations of this section shall result in a fine of not less than $100 nor more than $500.

Incarcerated Felons Can't Vote. St. 2001, ch. 150, amended G.L. c. 50, §1, and G.L. c.51, §1, to bar from voting convicted felons who are confined to a correctional facility.

APPELLATE ATTORNEY GET-TOGETHERS

Ever wonder what your peers are up to?

There has been interest for some time about panel appellate attorneys having a regularly scheduled meeting for educational, networking, and information-sharing purposes. It is time to get this idea off the ground! Anyone interested in having some type of monthly, bi-monthly or quarterly get-together **should e-mail the following information to Attorney Bonny Gilbert at ygilbert@tiac.net.**

Your e-mail address: _____

Preferred Time:

Lunch time ___ After work ___

Preferred Day:

Monday ____ Tuesday ____ Wednesday ____ Thursday ____ Friday_____

No Preference _____

Location Preference: Same location every month ____

Rotating location every month ____

Downtown Boston _____ West Suburban Area _____

North Suburban Area _____ South Suburban Area _____

Other _____ No Preference _____

Frequency:

Monthly ____ Bi-Monthly_____ Quarterly ____

II. MESSAGE FROM THE CHIEF COUNSEL: THE CRISIS IN INDIGENT REPRESENTATION

In the months since my fall, 2001 message, the Commonwealth's economy and tax receipts have continued their precipitous declines. This has had a dramatically negative impact on all state services, including the delivery of legal representation to the poor. Moreover, it presents an even more ominous threat to the future provision of competent legal representation for those who cannot afford to pay for it, and are entitled by the Constitution to have the benefit of it. Let me share with you some of the details.

In the span of two short years, from FY99 to FY01, we have lost 150, or 5.5%, of our assigned private attorneys. Essex County has lost over 11%; Worcester and Bristol, 8%; Suffolk and Middlesex, over 5%. Furthermore, these reductions have occurred despite the addition of scores of new attorneys in several practice areas. The losses are particularly pronounced on the criminal side: 8% in Superior Court; 7.3% in Youthful Offender; 3.2% in District Court. Many courts, most acutely in western Massachusetts, have asked for additional Public Defender assistance to fill the gap left by declining numbers of private counsel. But the public defender staff has suffered reductions from two sources: resignations induced by low salaries,

and premature retirements under the Commonwealth's early retirement incentive program. For the first time since the earliest days of this agency, our ability to provide a sufficient number of attorneys to provide high quality representation to each poor person who is entitled to it is called into question.

It is no secret why good lawyers are leaving the practice of indigent criminal defense in the Massachusetts courts. For a person who has successfully graduated from law school, passed the bar examination, and worked to establish criminal defense expertise, thirty (or even thirty-nine) dollars an hour -- or a $33,000 annual salary -- is nowhere near adequate to support oneself in this expensive state; much less harbor any realistic hope of supporting dependents, or repaying law school and college loans. Not only are these hourly rates and salaries embarrassingly and infuriatingly miniscule compared to beginning associate salaries at mid and large-size law firms; but they pale in comparison to public sector compensation in Massachusetts federal courts (ninety dollars an hour beginning May 1, 2002) and state courts of most comparable jurisdictions (typical hourly rate of $50 an hour; typical starting defender salary of $45-50,000).

These disparities are unfair and unacceptable. They leave the fulfillment of Gideon's promise in the public-spirited hands of CPCS staff attorneys and assigned private counsel: far fewer than 3,000 individuals who assure the continued endurance of two centuries of constitutional protections for a population of six million people. These attorneys -- you women and men who read this training bulletin -- are public heroes. You deserve recognition as such. More importantly, you deserve a decent, respectable rate of compensation which places a proper value upon the bedrock constitutional principles you strive every day to uphold and preserve. Soon, we will be bringing this urgent message to the Legislature, as it prepares the Commonwealth's budget for fiscal year 2003. Your detailed, personal, and respectful letter to your local Representative and Senator in support of the CPCS-proposed hourly rate and salary increases will help keep this continuing injustice visible, and its chance for correction alive. I realize that absent a sudden economic turnabout, the prospect of compensation increases this year are slim. But the constitutional protections we defend will not disappear. They will endure. And we will persevere until our voice is heard.

II. CASENOTES

The following casenotes summarize decisions released in August, September, and October, 2001. The Casenotes are written by Jane Larmon White (Always Shepardize, and check for any modifications by further appellate review.*)*

ADMISSIONS AND CONFESSIONS: ABSENCE OF 'MIRANDA' WARNINGS NEED NOT BE EXPRESSLY CONSIDERED RE: VOLUNTARINESS OF SPONTANEOUS STATEMENTS

A state trooper driving along was alerted by his "LoJack reader" to the presence of a nearby stolen car. He followed the car; eventually, the driver fled on foot, and after the trooper caught him, he kicked the trooper's previously injured leg in the ensuing fight, causing much pain and numbness. As the two walked back to the trooper's car, the driver-defendant began to blabber: he would be going to jail for life, he said; he had a prior criminal record, he said; he and a friend had accosted and intimidated the stolen car's driver and had taken money as well as the car, he said; they had gone out drinking afterward, and, he said, he should have known better than to drive around in a car that he had just stolen, having been "in the system" before. To all of this, the trooper made no response (except for volunteering, in response to the plaint that the

defendant would go to jail for life, that he wished that the defendant would, but that he doubted very much that this would happen). The trooper was preoccupied with the injury to his leg and the security of his weapon. After the trooper turned the defendant over to a second trooper, the defendant continued to lament that he would be sent back to prison, for life. The defendant's demeanor, along with the strong odor of alcohol, caused the trooper to believe that the defendant was inebriated. *Commonwealth* v. *Byrd*, 52 Mass. App. Ct. 642, further appellate review denied, 435 Mass. 1106 (2001).

Miranda warnings were not required: there was neither express questioning nor its functional equivalent. The Appeals Court rejected the defendant's argument that "even if Miranda warnings were not required, their absence was a specific factor that the motion judge had to weigh in considering whether the defendant's inculpatory statements were voluntary." *Id.* at 647-648.

ADMISSIONS AND CONFESSIONS: CUSTODY LACKING

The dead body of the defendant's girlfriend was found in her driveway, under the defendant's car. Her own car was missing. Purportedly because her relatives told police that she was extremely protective of her car and would not allow its use by anyone, the police wanted to find the car, and "treated the vehicle as stolen." Relatives also told police that the defendant was the woman's boyfriend, and a state trooper and a Barnstable police detective were sent to try to locate the defendant. They discerned that he would be at his place of work as a teacher's aide at a residential school, and contacted state police in Plymouth to go to that school to locate the missing car and the defendant. Two plainclothes officers met with the defendant there, while a state trooper looked for the missing car on the school grounds. (He found and "secured" it, perhaps unbeknownst to the defendant.) The defendant was told only that they wanted to talk to him about the missing car; he volunteered that he had traded cars with his girlfriend the night before so that she could take his car into the shop for an oil change. "Small talk" ensued until a state trooper arrived, and the defendant repeated to him the story about the oil change; the defendant agreed to go "straighten out" any problem about the car, but asked that he not be placed in handcuffs in front of the schoolchildren, prompting the trooper to tell him that he was not under arrest.

The drive to the Yarmouth state police barracks and the initial time there purportedly passed with small talk, offers of soft drinks, and repeated unaccompanied visits by the defendant to the bathroom. The police kept up the "stolen car" investigative pretense, eventually saying that the girlfriend's relatives thought it had been stolen. When the defendant asked why the girlfriend herself had not been contacted, an officer told the defendant that she was dead. At this, the defendant became visibly shaken, trembling and gagging. Another unaccompanied trip to the bathroom ensued, and thereafter the defendant's hands were trembling such that he required help to light a cigarette. At this point, the defendant asked if he needed a "solicitor," which upon inquiry he explained was an attorney where he came from (Ireland). He was told that he was not under arrest, was not charged with anything, and did not therefore need an attorney. He was questioned, however, about his activities with his girlfriend the night before. In less than half an hour, the interrogator was told, privately, that police had found blood spatters in the girlfriend's car. The interrogator then told the defendant that "we have a problem," and confronted him with the information about the blood, saying it was inconsistent with the version of events given by the defendant, and that he would thus "have to read the defendant his rights." The defendant was read his rights, read them himself, and confirmed that he understood them. He also signed,

eventually, a waiver of same. *Commonwealth* v. *Groome*, 435 Mass. 201, 207-208 (2001).

The defendant eventually spilled the story of killing his girlfriend, first using some tool or chisel she had, then dropping a concrete block on her, and then driving cars over her body (to conceal it, and later to retrieve car keys belatedly realized to be on her person). The SJC broomed arguments that the confession should have been suppressed. Primarily, the defendant wasn't in custody until after the point of the warnings. Second, although the officers told him that they would not talk to him further until he signed the waiver portion of the rights form, there was no requirement that the defendant sign the waiver for it to be effective, notwithstanding the interrogators' premise. The defendant had continued to talk to the police after acknowledging he understood his rights (asking "You think I did it, don't you?" [receiving an answer "I think that you're involved in it"], remarking that this would kill his mother, that his family was "religious," that "this will be very hard on them," asking the officers about their families and whether they were "religious," inquiring about an Irish ring on the finger of one officer, etc.), and this eventually prompted the officers to tell him that they had better things to do on the investigation and that if he did not want to talk to them, he should say so directly or ask for an attorney. While he was still reluctant to sign, he continued talking. He wanted to go outside for a walk, but was told that "it would benefit no one" to do that because they could not talk to him without a signed waiver. He then signed, and went for a walk outside with the officers without handcuffs or other restraints. On this jaunt, he bought cigarettes, and stated that "This will probably be my last walk for a long time." As they returned from the walk, he confessed that he had killed the girlfriend.

ADMISSIONS AND CONFESSIONS: JUVENILES' STATEMENTS INVOLUNTARY, THOUGH MOTION JUDGE'S DETERMINATION OF 'INTERESTED ADULT" ISSUE OVERRIDDEN

A juvenile under the age of fourteen must actually consult with an interested adult before any finding of a valid waiver of Miranda rights can occur. If a juvenile has attained the age of fourteen, police must provide a genuine opportunity for a meaningful consultation with an interested adult prior to obtaining a Miranda waiver. In *Commonwealth* v. *Leon L.*, 52 Mass. App. Ct. 823 (2001), a juvenile court justice had ordered suppression of statements on the ground that two juveniles' mothers were not "interested adults" under controlling law because even with the assistance of an interpreter, "they did not sufficiently understand their sons' situations" to provide "meaningful consultation." Alternatively, the judge ruled, suppression was necessary because the manner of the police interrogator and the totality of the circumstances failed to establish that the statements were voluntary. The Appeals Court reversed the former conclusion, claiming that the officers conducting the interview had "objective facts indicating that the mothers were parents who comprehended the events ... and who could assist the juveniles in the choices they had to make." *Id*., quoting from Commonwealth v. Philip S., 414 Mass. 804, 810 (1993). When determining a suppression issue of this sort, one is obliged to view the situation "from the perspective of the officials conducting the interview, assessed by objective standards [.]" Id. at 809. The two juveniles' mothers were present at the police station, signed the Miranda forms, and purportedly asked questions of the Spanish-speaking police officer who acted as interpreter.

The Appeals Court did not countermand the lower court's determination that the statements were nonetheless to be suppressed as involuntary. The primary investigator began the interview by slamming his hand on the table where the first juvenile sat, and spoke very loudly, pressuring the juvenile to make a statement. Though one juvenile (who had come to this country from the Dominican Republic four year earlier) first denied involvement in the setting of the fire

under investigation, and was quite frightened and upset (as was his mother, who broke down and cried), the Spanish-speaking officer urged him to admit any wrongdoing. The second juvenile arrived at the station after the first juvenile and was with his mother. This mother was nervous, and the juvenile cried as he denied wrongdoing. When the mother returned to the room after a brief departure to use the bathroom, her son was confessing his involvement. She was distraught and uncertain as to what to do, and described her son as "nervous" and "crying" throughout the time he made the statement.

ADMISSIONS AND CONFESSIONS: MIRANDA WARNINGS, INVOCATION OF RIGHT TO COUNSEL; HARMLESS ERROR

The defendant, an Air National Guardsman, killed his girlfriend and their two sons, purportedly after she threatened to tell his wife about his secret other life. When a neighbor of the victim found her body, Lowell police contacted the air base, and the defendant's superiors there contacted the defendant at his home. Lowell police and a state trooper thereafter arrived at the defendant's house, and he agreed to drive his own car to the Lowell police department to be questioned. There, from 9:30 p.m. to 1 a.m., he was questioned. He was then "placed under arrest." The judge hearing the defendant's motion to suppress found that the questioning was a custodial interrogation, but found as well that the defendant had been read his Miranda rights and signed a valid waiver both before the interview and "at the start of the taped interview." During the interview, the defendant steadfastly denied having gone INTO the victim's home, though agreed, belatedly, with the police suggestion that he had gone TO the home without having gone into it. When his interrogator shifted to assume that he had indeed gone into the home, he responded, "I think at this point we need to stop." The officer questioned, "Why do we need to stop?", and he responded, "I think we're going to stop, and I think I'm going to get a lawyer. If this is the way this is going, you're either accusing me or charging me." Q: "I'm not charging you. I'm asking you what happened." *Commonwealth* v. *Contos*, 435 Mass. 19, 28-29 (2001).

Although the motion judge concluded that the statement, "I think I'm going to get a lawyer" was "ambiguous," and that the continued questioning was a reasonable attempt to clarify the ambiguous or equivocal request for counsel, the SJC disagreed: "the phrase, 'I think I'm going to get a lawyer,' was an unambiguous invocation of the defendant's right to counsel." *Id.* at 29. Furthermore, even if the request for counsel had been ambiguous, the Court was not prepared to agree that "clarification of the request for counsel would have been constitutional." *Id*. at 30. Statements obtained following an invocation of the right to counsel are presumed involuntary unless the Commonwealth proves beyond a reasonable doubt that the defendant "initiated further communication, exchanges, or conversations with the police [.]" *Id.*, citing Edwards v. Arizona, 451 U.S. 477 (1981). This defendant received no relief, however, since the Court believed that the error was harmless beyond a reasonable doubt, the admissions being "merely cumulative of evidence the Commonwealth had obtained at the time the statements were made." *Id.* at 31.

ADMISSIONS AND CONFESSIONS: SILENCE AFTER MIRANDA WARNINGS ISN'T NECESSARILY AN INVOCATION OF SILENCE

The defendant was convicted of first degree murder in a particularly notorious case, the killing of ten-year-old Jeffrey Curley. He had sought out the police when a search for the missing boy first began, on the morning of October 2, and told them he had seen the victim in the afternoon of the previous day. While passing out flyers concerning the missing boy, he

spoke to an officer again at noon, after the officer had been told of his information and sought him out. A little after 3 p.m. on the same day, he came to the police station in response to being paged, albeit in transportation provided by the police when he said he had no transportation. As he had on the earlier occasions, he said that he had seen the victim enter a specific house in the afternoon the day before. The defendant stated that he himself had met up with one Charles Jaynes thereafter, that the two of them had gone to the library and then to Jaynes's place of work, a car dealership in Newton, and thereafter to Jaynes's apartment in New Hampshire. He also said, as before, that he had seen Jaynes driving the victim around in Jaynes's car during the preceding weeks, and that Jaynes had offered the victim a bicycle. At about 5 p.m., Cambridge detectives received a phone call from Newton police saying that they had arrested Jaynes on outstanding warrants. The Cambridge detective inquired whether the defendant was present with Jaynes at the Newton police station. He was, and was put on the line with the Cambridge detective, who asked why the defendant had not responded when he had "beeped" him sometime after the earlier interview had ended at 3:45 p.m. The defendant agreed to return to the Cambridge police station. A car was sent to bring him in, and he arrived at about 7 p.m.. Although he was not a suspect, the detective "prudently" read him Miranda warnings. He stated that he understood each of his rights, and that he wanted to talk to police. He was also given a Miranda card, which he read and signed. *Commonwealth* v. *Sicari*, 434 Mass. 732, 739-740 (2001).

Before 9 p.m., he had spontaneously written an address in Manchester, New Hampshire, and a false name he said was used by Jaynes. At some point, he agreed to take a polygraph test, and from responses given during the "posttest interview," the examiner gathered that the defendant was now supplying much more substantive information about Jaynes and his motives with regard to the boy. The examiner asked him to repeat this information to the detectives, but to them, he cried uncontrollably, gasped for air, and "jump[ed] around" saying "that he thought something bad had happened to the victim at the car dealership." Because the defendant was "not making sense," the detective asked him if he had been "straight" with the detective during the earlier conversations. When the defendant said that he had, the detective responded, "Well, then why didn't you tell us about the bag of lime you bought last night at Home Depot?" At this, the defendant stopped crying and became angry, saying, "Fuck it. .... Lock me up," and "I fucked up." When asked what he should be locked up for, and how he had "fucked up," the defendant did not answer. The questioner left the room, but was replaced a few minutes later by two other law enforcement officers. When they "attempted to introduce themselves," the defendant blurted, "Lock me up; I'm guilty; get my room ready," and repeated this refrain four times.

One of the officers again read to the defendant Miranda rights from a card; the defendant did not respond when asked immediately thereafter if he wanted to talk to the police, **and did not respond to the "ten or twelve questions" the officers asked in the ensuing "twenty to thirty minutes."** *Id.* at 743 (emphasis added). The defendant changed posture, and sat with his sweatshirt pulled up over his mouth, which did not stop the questioning: "For another ten minutes, [he was asked] what he was guilty of, why he should be locked up, and what was going on." Beginning at 1:30 a.m., then, with the defendant stating that he was "guilty," but that he had not killed the victim, the defendant spoke "in excruciating detail" about what had happened to the victim. *Id.*

Given the circumstances here, including the fact that the defendant had availed himself of his right to silence during three earlier arrests, the Court did not "disturb the judge's finding that Sicari's thirty- to forty- minute period of silence, in the middle of a lengthy interview, and after

two written waivers, was neither an invocation of his right to remain silent, requiring the termination of police questioning, nor an ambiguous request limiting further police questioning to clarifying the defendant's intention." *Id.* at 749. ***Practice tip.*** The SJC reserved the issue of whether it would adopt the "clear articulation rule" attributed to Davis v. United States, 512 U.S. 452 (1994) ("if the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him," or any obligation to ask clarifying questions). "A clear and unambiguous invocation of a suspect's rights is one which is articulated 'with sufficient clarity so that a reasonable police officer would understand [the] statement to be an assertion of the right to remain silent.'" 434 Mass. at 749 (citation omitted).

ADMISSIONS AND CONFESSIONS: TAINT OF ILLEGAL HOME ENTRY DISSIPATED; SUPPRESSION DENIED

See *Commonwealth* v. *Chongarlides*, 52 Mass. App. Ct. 366, further appellate review denied, 435 Mass. 1104, 1106 (2001), summarized at ***SEARCH AND SEIZURE: PROBABLE CAUSE; "NEXUS" TO CRIME/EVIDENCE AND PLACE SEARCHED NOT SHOWN IN WARRANT APPLICATION; ADMISSIONS UNTAINTED BY PRIOR ILLEGAL ENTRY***.

APPELLATE PRACTICE: EAGERNESS TO DEEM ARGUMENT "WAIVED" WHEN ENUNCIATED PURELY FOR PRESERVATION OF FEDERAL HABEAS CORPUS ISSUE

Juvenile defendants moved, after appellate reversal of their "delinquencies by reason of second degree murder", to have the charges dismissed on the ground that they were no longer juveniles and that the Juvenile Court lacked jurisdiction to conduct a retrial. In an unrelated case (Santiago v. Commonwealth, 427 Mass. 298 [1998]), the SJC agreed with this contention. Thereafter, though, the Legislature enacted St. 1998, ch. 98, giving the Juvenile Court continuing jurisdiction over persons whose cases were properly commenced in that Court pending final adjudication of such cases, and asserting that the provision would apply to offenses allegedly committed between 12-31-91 and 9-30-96. Although the SJC subsequently held (in that same unrelated case) that this legislation was not an ex post facto law prohibited by the U.S. Constitution (Santiago v. Commonwealth, 428 Mass. 39, 40-42, cert. denied. 525 U.S. 1003 [1998]), current appellants argued again that application of the legislation to their cases was a violation of due process. The SJC seemed mighty annoyed that no "cogent reasoning or citation to authority" was made in support of this argument, and believed it to have been made "for the express purpose of preserving the defendants' rights to petition a Federal court for a writ of habeas corpus [.]" The Court deemed the issue to have been waived. *Commonwealth* v. *DiRenzo*, 52 Mass. App. Ct. 907, 909, further appellate review denied, 435 Mass. 1104 (2001). ***Practice tip.*** If you are trying to preserve an issue for federal habeas purposes, take the time (and space) to cite cases supportive of your contention.

APPELLATE PRACTICE: INTERLOCUTORY RELIEF NOT REQUIRED

The defendant's petition for relief from a single justice pursuant to G.L. c.211, §3 was denied. He appealed to the full bench, but the Court held that he had not shown (as required by Rule 2:21) that the normal course of appellate review after a final adverse judgment would be inadequate. What he sought was review of the denial of his motion to dismiss an indictment. What he proffered as the reason requiring relief prior to a final adverse judgment was that unless he could obtain such review, he would probably be obliged to accept an extremely favorable

disposition contingent upon his guilty plea[s] to reduced charge[s] and his fulfillment of a "cooperation agreement." The offer would be withdrawn after a trial date was set; if he were tried and convicted, the charges and penalties to which he would be subjected would be substantially greater. "That's the way the cookie crumbles," was the gist of the holding. The relevant consideration was not whether he would or would not be restored to his pretrial status by a post-conviction appeal, but instead whether review of the denial of the motion to dismiss could not "adequately be obtained on appeal ... or by other available means." *Doe* v. *Commonwealth*, 435 Mass. 1001 (2001). "The petitioner has not established that the potential loss of access to the benefits of the cooperation agreement is a substantial claim of a violation of a substantive right." *Id.* n. 1.

Without analysis, the SJC also claimed that a different petitioner failed in his Rule 2:21 burden when he sought interlocutory relief from a pretrial detention order under G.L. c.278, §58A ("preventive detention"). *Revaleon* v. *Commonwealth*, 435 Mass. 1002 (2001).

APPELLATE PRACTICE: M.R.APP.P. 16 (l) LETTER

The Appeals Court in *Commonwealth* v. *Siano*, 52 Mass. App. Ct. 912, 913 n. 1, further appellate review denied, 435 Mass. 1108 (2001), refused to consider what were said to be "additional arguments" made by way of a letter to the Court purportedly submitted pursuant to M.R.App.P. 16(l). That rule covers the means by which a party may advise the Court (only) of supplementary citations coming to the party's attention after briefing is completed.

APPELLATE PRACTICE: PRESERVATION, LACK OF

See *Commonwealth* v. *Cowans*, 52 Mass. App. Ct. 811, 820-821 (2001), summarized at ***CRIMES: ARMED HOME INVASION (G.L. c.265, §18C), REQUIREMENT OF INTENT TO CAUSE FEAR***.

BAIL: CASH OR "EQUIVALENT AMOUNT" IN SURETY COMPANY BOND

G.L. c.276, §58, first paragraph, last sentence, provides: "If the justice or clerk or assistant clerk of the district court, the bail commissioner or master in chancery determines that a cash bail is required, the prisoner shall be allowed to provide an equivalent amount in a surety company bond." Despite twenty years or so of criminal law practitioners' hearing "5,000 cash, 50,000 surety," or like incantations, when a Superior Court judge was asked within the past year to set the same bail as had been set in district court, i.e., $1 million surety bond or $100,000 cash, [s]he declined, saying that the surety and cash amount had to be the same. The judge relied on G.L. c. 276, §58. Given this bail order, the defendant could have gained liberty "either by paying $100,000 in cash directly into the court (which would have been refundable to him at the conclusion of the case), or by securing a surety company bond in the face amount of $100,000 by paying a bail bondsman a nonrefundable fee of up to ten per cent (the maximum premium allowed) of the bail amount, that is, up to $10,000." *Commonwealth* v. *Ray*, 435 Mass. 249, 251 (2001).

Six out of seven SJC justices believed that the word "equivalent amount" in the statute did not mean "equal in value," but instead meant "equal in effect." "In the bail context, we conclude that a surety bond set at an amount ten times the amount of a cash bail is equal in effect to that cash bail." Several reasons were cited: "the amount of the surety bond is equal to the minimum value of bond that could be obtained with the sum set as cash bail; the financial burden on the defendant is virtually the same; and the effect of ensuring the defendant's appearance in

court throughout the proceedings is as great." *Id.* at 258. Of course, the difference is that on the "cash" option, the money is refundable if the defendant "perform[s] ... all the conditions of his recognizance." *Id.* at 255.

COMPETENCE: DEFENDANT'S MENTAL RETARDATION

The defendant, who was perhaps 62 or 63 years old at the time of his trial for alleged sexual assaults upon a child more than eight years earlier, was mentally retarded: he had had no formal schooling, and had been able to retain employment only at minimally challenging jobs. Even the Commonwealth's expert, who emphasized "certain strengths" of the defendant, acknowledged that the defendant's greatest difficulty would be to pay sufficient attention to assist his attorney, and that the information flow and speed of trial would "seriously tax his capacity to attend and concentrate. ... Whether the capabilities described here are sufficient for him to be found competent to stand trial in a proceeding of high risk to him remains an open clinical question and will await the Court's final determination." *Commonwealth* v. *Wentworth*, 53 Mass. App. Ct. 82, 85-86 (2001). The defendant's expert reported that the defendant had a marginal factual understanding of court proceedings, and that such understanding would be lowered during a trial because of his anxiety and confusion. The judge sought, and obtained, the defense expert's agreement that he would sit with the defendant during trial and attempt to help him "maintain... his focus on what the proceedings [are]," *id.* at 86, a step recommended by the Commonwealth's expert to ameliorate the defendant's acknowledged deficits. *Id.* at 85 (use simple words, break complex sentences, speak slowly to him, remind him frequently to concentrate, frequently ask him questions about his understanding that avoid yes/no answers).

The judge's determination that there would be a "reasonable probability" that the defendant could grasp what was going on if the suggestions of the Commonwealth expert were adopted and if the defendant's expert assisted the defendant throughout was held by the Appeals Court to be a permissible finding (i.e., not an "abuse of discretion") that the defendant was competent to stand trial. *Id.* at 88-89.

COMPLAINTS AND INDICTMENTS: EVIDENCE TO GRAND JURY OF TWO DRUG SALES, BUT ONLY ONE ACT CHARGED

Two undercover detectives investigating prostitution were about to arrest a prostitute when she begged to be left alone and promised to deliver to them a heroin dealer in exchange for the favor. One of them dialed, from a pay phone on Cedar Street a pager number she had given them. Though the page was not answered, a man the prosecution contended was the defendant drove up within a few minutes. The prostitute got into his car, but subsequently reported that he had not wanted to make the sale because he had seen a police car in the vicinity. She directed them to drive to Main Street, to a different pay phone. After one of them dialed the pager number, the pay telephone rang, and the prostitute spoke to the caller, saying “I need one more.” In about twenty minutes the man again drove up. One of the detectives approached him this time, and for $60 received a “bundle” of heroin, i.e., ten bags. After the man left, the detectives accused the prostitute of having bought heroin from the man on the first occasion, on Cedar Street. She confessed, and handed the detectives a bundle of bags which she took from her pants pocket. The defendant was arrested sometime later. *Commonwealth* v. *Spencer*, 53 Mass. App. Ct. 45, further appellate review denied, 435 Mass. 1107 (2001).

One detective testified to the foregoing before the grand jury, which returned indictments for distribution of heroin, for the same crime as a subsequent offense, and for distribution of

narcotics within one thousand feet of a school. The defendant was convicted by a jury for distribution and the school zone offense, and pled guilty thereafter to the "subsequent" charge. On appeal, he argued that since the grand jury had heard evidence of two sales (one to the prostitute, and the later one to the detective) but returned indictments based only upon one such sale, it could not be known whether he had been convicted of crimes for which the grand jury had indicted him; he also argued that his trial attorney's failure to file a motion to dismiss on this basis constituted ineffective assistance of counsel. The Appeals Court held, however, that given the precise testimony of the detective before the grand jury, and his references to "Main Street" and its required proximity to a particular school, it was clear that the grand jury based its indictments upon the sale to the detective, not the sale to the prostitute. *Id*. at 50-51.

A second issue on appeal was whether the trial judge was required, given the defense request, to instruct the jury that they could draw a "missing witness" inference against the prosecution for the Commonwealth's failure to call as a witness the prostitute. The Court asserted both that the judge could have considered the witness equally available to the parties and that it was "doubtful that [she] would have offered testimony 'of distinct importance to the defendant's case.'" If the defense was misidentification (and it would seem that it had to be, i.e., the defendant wasn't there, and didn't know "Rose"), and the prostitute was identified in discovery only as "Rose" with no further information, both of these rationales are entirely bogus.

The defendant also argued that the detective's testimony at trial as to what the prostitute had said to him prior to contacting the seller by pager number was inadmissible hearsay. There had been no objection at trial when the evidence was introduced, and an unsuccessful motion in limine was inadequate to preserve the issue. *Id*. at 51. The Appeals Court ruminated alternately that the statements were not hearsay "since they were offered as the reason why the police acted as they did, rather than being offered for the truth of their contents[,]" or that if there was error, it did not create a substantial risk of a miscarriage of justice because of the direct testimony of the two police eyewitnesses. *Id*. ***Practice tip***. Although the SJC has "permitted the use of carefully circumscribed extrajudicial statements in criminal trials to explain the state of police knowledge[,]" "[t]estimony of this kind carries a high probability of misuse." Commonwealth v. Rosario, 430 Mass. 505, 508-509 (1999). "Disclosure of the substance of the conversation ordinarily is not required, and should be curtailed because of its prejudicial potential." *Id*. at 509. Furthermore, "the police action or state of police knowledge must be relevant to an issue in the case." *Id.* at 510. It is difficult to imagine how the prosecution could claim that whatever the prostitute said was truly material to the issue of the defendant's guilt, unless such assertions were being used (illegitimately) for their truth.

CONFRONTATION: CROSS-EXAMINATION RE: MOTIVE TO INVENT CLAIM OF SEXUAL ASSAULT

The sexual assault complainant contended that the defendant, who stayed in an apartment downstairs from the apartment of the complainant's boyfriend, pushed his way into the apartment while she was alone there. She claimed that he had grabbed her wrist to restrain her, touched her breasts, and put his hand up under her shorts, telling her that he knew she "wanted it," that he wanted to "screw [her] in the ass," and that they could either do it now, since her boyfriend wasn't expected back until 5:30 p.m., or at about 3:30 a.m., when she got back from work. She claimed that she managed to get to the front door and unlock it and scream out into the hallway, prompting him to leave. The defendant, on the other hand, testified that the complainant had invited him into the apartment to watch television, but that she heard a vehicle pull into the

parking lot about ten minutes later, and told the defendant he would need to leave. He left via the back door and saw no one on the back stairway as he left, and denied that there had been any sexual assault. *Commonwealth* v. *Morin*, 52 Mass. App. Ct. 780 (2001).

The Appeals Court reversed the defendant's multiple convictions because the trial judge barred trial counsel from cross-examining the complainant about her allegedly abusive boyfriend. According to the defense theory, the "tumultuous relationship provided a motive to the complainant to invent the incident because after her boyfriend arrived home unexpectedly, she feared he would punish her for socializing with the defendant." *Id.* at 783. Trial counsel had proffered to the judge a certified record of conviction of the complainant's boyfriend for assault and battery against the complainant on a date about five months after the incident for which the defendant was being tried. On the date of the assault and battery complaint, the complainant also took out a restraining order, and in the supporting affidavit described "an on-going abusive relationship between her and her boyfriend, dating back three years" and thus encompassing the time before and during the alleged sexual assault by the defendant. *Id.* at 783-784.

COUNSEL, CONFLICT OF INTEREST

The appeals unit of the public defender division was assigned to represent one Thompson on appeal of his conviction for murdering his wife. Thompson, who was represented at trial by a private attorney, had offered alibi evidence at his trial, and had also presented evidence about an allegedly similar murder of a young woman in a neighboring town, for the inference that the killer in that instance, allegedly one Miller, had committed the murder of Thompson's wife. About ten months after his appellate representation of Thompson began, appellate counsel became aware that a public defender trial attorney was representing Mr. Miller in that other homicide prosecution. Appellate counsel for Thompson sought an opinion from bar counsel concerning the "dual representation of [Miller] and Thompson by CPCS," and was told that it was "a waivable conflict." The attorney then obtained a waiver from Thompson, and continued to represent Thompson on appeal of his first degree murder conviction. The attorney did not suggest to the trial attorney representing Miller that there might be any conflict in his continuing to represent Miller. In a motion for new trial, appellate counsel for Miller argued that his trial attorney had a disabling, "actual," conflict of interest, such that reversal of Miller's first degree murder conviction was required. *Commonwealth* v. *Miller* 435 Mass. 274, 280-282 (2001).

The SJC held that the defendant had not established "an actual or genuine conflict of interest," which "arises where the 'independent professional judgment' of trial counsel is impaired, either by his own interests, or by the interests of another client.'" *Id.* at 282 (citation omitted). Miller's case had nothing to do with Thompson's appeal, however, because Thompson had been permitted at trial to present evidence about Miller, and had been allowed to argue that Thompson's wife's murder and the murder for which Miller was convicted were the work of one individual. "In convicting Thompson, the jury in that case rejected the theory that the two murders had been committed by the same person, and Thompson never raised any issues concerning this evidence in any postconviction motion or in his direct appeal to this court." *Id.* at 283. The Court further opined that, in fact, the two homicides did NOT bear such unique similarities as to support an inference that they were committed by the same person. *Id.*

COUNSEL, INEFFECTIVE ASSISTANCE

The attorney for the defendant, charged with first degree murder, moved for and obtained an order allowing $1,500 in funds for an investigator. These funds were never used. "The

defendant maintain[ed], with considerable support, that his trial counsel initiated absolutely no investigation of the circumstances of the murder." Though the attorney promised in his "dramatic" opening statement that the defendant would testify and explain where he had been at the time of the crime, the defendant did not thereafter take the stand. The attorney failed to impeach an identification witness with prior convictions for larceny. The attorney failed to exercise available peremptory challenges to strike a correctional officer at the very facility where the defendant was being held prior to and during trial. The SJC refused to find ineffective assistance of counsel, though the dramatic opening statement promise gave the Court some pause. *Commonwealth* v. *Duran*, 435 Mass. 97, 109 (2001). The record was inadequate: the Court would require some explanation by trial counsel of "why defense counsel initially believed (if he did) that the defendant would testify," and why this seeming belief changed. The matter could have been, but was not, raised in the defendant's motion for new trial. As to the other claims, the defendant failed to show that more and better work could have accomplished something favorable to the defendant.

COUNSEL, INEFFECTIVE ASSISTANCE; INCONSISTENT DEFENSES

On appeal of his conviction of first degree murder and related crimes, the defendant argued that his trial attorney had provided ineffective assistance by presenting both a defense of misidentification and a mental impairment defense. The SJC's perusal of the record, however, convinced it that the defendant himself had insisted upon the hopeless misidentification defense, and had explicitly concurred with presentation of the mental impairment evidence only after evaluation of the Commonwealth's case in chief at trial. Furthermore, the attorney had acknowledged to the defendant, prior to introduction of the mental impairment evidence, that it was probable that the mental impairment defense would be considered by the jury as negating the "primary" misidentification defense. The attorney had advised him "that the strength of the Commonwealth's identification evidence would yield that result in any case," and opined "that the defense of mental impairment provided the only real possibility of avoiding a verdict of murder in the first degree." *Commonwealth* v. *Johnson*, 435 Mass. 113, 129 (2001). It was abundantly clear that the SJC agreed with the trial attorney's assessment: no ineffectiveness was found, though the first degree murder conviction was reversed due to erroneous jury instructions. The evidence is summarized at ***JURY INSTRUCTIONS: MURDER, DELIBERATE PREMEDITATION; REVERSIBLE ERROR IN INCLUSION OF SECOND AND (ERRONEOUS) THIRD PRONG MALICE DEFINITIONS***.

COUNSEL, INEFFECTIVE ASSISTANCE: FAILURE TO MOVE FOR SUPPRESSION

The defendant's claims regarding ineffective assistance of trial counsel were apparently presented in the direct appeal, without having been argued in a motion for new trial pursuant to M.R.Crim.P. 30. Some of the "ineffective" claims concerned counsel's failure to move to suppress latex gloves and a roll of duct tape seized from the defendant's workplace toolbox. The Appeals Court reasoned that there was no prejudice from such an omission, because "there was uncontested evidence that latex gloves were found in the defendant's apartment and in the van he used on the night of the crime." Further, such gloves were in baskets "thoughout the defendant's workplace in areas where the defendant had no reasonable expectation of privacy." The defendant's employer showed the officer around the company. Although the employer also gave the officer gloves from the defendant's toolbox, the record was inadequate to support findings concerning whether the defendant "controlled the toolbox," and whether it was closed or open,

and thus whether the defendant had a reasonable expectation of privacy in the toolbox. "[T]his part of the claim is not suitable for analysis on direct appeal." *Commonwealth* v. *Ye*, 52 Mass. App. Ct. 390, 395, further appellate review denied, 435 Mass. 1107 (2001).

COUNSEL, INEFFECTIVE ASSISTANCE OF: FAILURE TO OBJECT TO JURY INSTRUCTIONS IMPOSING DUTY OF RETREAT IN SELF-DEFENSE CASE; APPLICABILITY OF "CASTLE" LAW

In the light most favorable to the defendant, the evidence at trial was that his half-brother, a large man with a propensity for violence, had previously assaulted the defendant, and at the time he was killed, possessed a gun and threatened the defendant with serious bodily harm. The fatal shooting, and verbal argument preceding it, occurred in the defendant's apartment. There was further evidence that the defendant had repeatedly told the victim to leave the apartment, but that he stayed, that the defendant became frightened as the argument escalated and the victim pulled out the gun, and that the defendant dove out of his seat and fired twice at the victim, killing him. At the trial which resulted in the defendant's conviction of second degree murder, the judge instructed the jury on self-defense, but included that the defendant had had a duty to retreat, i.e., "must have used any avenues of escape that were reasonably available before resorting to force to protect himself if this could be done without exposing himself to further danger." *Commonwealth* v. *Peloquin*, 52 Mass. App. Ct. 480, 483 n. 4, **further appellate review allowed, 435 Mass. 1104** (2001). The conviction was affirmed on direct appeal. On appeal of the denial of his pro se motion for new trial, however, the conviction was reversed on the ground of ineffective assistance of counsel. Because there was a jury question of whether the victim was lawfully in the apartment (given the evidence that he had been asked to leave but had refused), the defendant would have been entitled, on request, to have the jury instructed on "the Castle law." This statute, G.L. c.278, §8A, provides that in the prosecution of a person who is an occupant of a dwelling charged with killing or injuring one who was unlawfully in said dwelling, it is a defense that the occupant was in his dwelling at the time of the offense and that he acted in the reasonable belief that the person unlawfully in his dwelling was about to inflict great bodily injury or death upon the occupant or another person lawfully in the dwelling, and that the occupant used reasonable means to defend himself or such other person; further, "[t]here shall be no duty on said occupant to retreat from such person unlawfully in said dwelling."

Counsel's failure to object to the "duty to retreat" language in the jury instructions, and failure to request instructions consistent with the "Castle law" deprived the defendant of a viable defense. The Commonwealth's argument that "retreat was never a live issue at trial" disregarded the instruction given, i.e., that "the defendant was unconditionally obliged to 'use[ ] any avenues of escape that were reasonably available before resorting to force to protect himself [.]'" *Id*. at 484 (italics in original). ***Practice tip***. If the defendant had not been represented on appeal by the same attorney who represented him at trial, the issue almost certainly would have been deemed "waived," as it was available on the record in the direct appeal. *Id.* at 484-485.

COUNSEL, INEFFECTIVE ASSISTANCE OF: FAILURE TO PRESENT EVIDENCE CORROBORATIVE OF DEFENDANT'S CREDIBILITY/ DESTRUCTIVE OF POLICE CREDIBILITY

See *Commonwealth* v. *Wen Chao Ye*, 52 Mass. 850 (2001), summarized in pertinent part at ***POST-CONVICTION PRACTICE: "DISCRETION" OF TRIAL JUDGE TO IGNORE EVIDENCE ON MOTION FOR NEW TRIAL SEEMINGLY LIMITLESS!***

CRIMES: ABUSE PREVENTION ORDER, VIOLATION OF; PRESENCE INCIDENTAL TO RETURN OF MINOR CHILD

There was in place a protective order prohibiting the defendant from coming within fifty yards of his ex-wife and prohibiting him from stalking her. The ex-wife had custody of the two minor children, but the defendant was granted the right to take the children from the household for unsupervised visits. "Under the terms in effect at the time of the alleged violation, the defendant was to 'remain in his vehicle at all times' during visitation pick up and drop off." On the occasion at issue, the defendant drove to the multi-unit building in which the ex-wife and children resided in a basement apartment. The defendant honked his horn, and the six-year-old child came out and entered the car. The older child was ill and unable to participate in the visit. About three hours later, the defendant returned to drop off his son, but when he sounded his horn, there was no response. Because he did not want to leave the six-year-old unescorted, he got out of the car and accompanied the child into the unlocked front entrance of the building, which led to the foyer containing occupants' mailboxes and a buzzer system to contact individual apartments. An electronic lock controlled a glass interior door that opened to a stairway leading to the wife's apartment. The ex-wife buzzed open the door, and then heard one of the children say, "Daddy's inside the building again." She saw the defendant moving through the inside foyer door that she had "buzzed" open, but slammed her apartment door before discerning whether he had begun to descend the stairs leading to the apartment entrance. He was within four or five yards of the ex-wife's door at the time. The ex-wife called the police; though an officer arrived less than five minutes later, there was no sign of the defendant. *Commonwealth* v. *Stewart*, 52 Mass. App. Ct. 755, 757, 759 (2001).

The defendant acknowledged a "technical" violation of the 209A order when he chaperoned his son into the foyer; he clearly hoped for jury nullification. It didn't happen, perhaps because the ex-wife repeatedly inserted into her testimony non-responsive comments conveying that the defendant had violated the restraining order numerous times in the past. An example was her response to the question about how long it took for the police to respond: "They have been out dozens of times, this particular time I don't [know]." The defendant's arguments for a required finding of not guilty (premised upon terming the violation a necessary "incident" to the permitted visitation with his child) and for reversal based upon the admission of "bad acts" testimony from the wife were unsuccessful. He should have stayed in the car, said the Court, *id.* at 759. As to the bad acts evidence, the Court played stupid as to its toxicity, claiming that it was harmless because the jurors simply had to deal with the issue of whether leaving the vehicle was, in the circumstances, only "a 'technical violation' not subject to criminal sanctions." *Id.* at 764.

CRIMES: ARMED HOME INVASION (G.L. c.265, §18C), REQUIREMENT OF INTENT TO CAUSE FEAR

"The crime of armed home invasion has four elements: that the defendant (1) knowingly entered the dwelling place of another; (2) knowing or having reason to know that one or more persons are present within (or entered without such knowledge but then remained in the dwelling place after acquiring or having reason to acquire such knowledge); (3) while armed with a dangerous weapon; and (4) used force or threatened the imminent use of force upon any person within such dwelling place whether or not injury occurred, or intentionally caused any injury to any person within such dwelling place." *Commonwealth* v. *Cowans*, 52 Mass. App. Ct. 811,

814-815 (2001) (citations and internal quotation marks omitted). Upon the prosecutor's request, the trial judge charged specifically (and did so repeatedly thereafter, in response to particular questions) that "the mere entry of a house with a weapon in hand is sufficient to trigger the assault aspect of it. The weapon doesn't have to be brandished or waived at anybody. A person coming into a home with a weapon, that constitutes an assault. That is sufficient evidence to constitute an assault." *Id.* at 817. This was an erroneous instruction. "[I]n the case of a threatened battery type of assault, the Commonwealth must prove that the defendant engaged in objectively menacing conduct with the intent to put the victim in fear of immediate bodily harm." *Id.* at 819 (citation omitted). In the future, instructions on the home invasion statute should state that the jury must determine whether the Commonwealth has proved beyond a reasonable doubt that the defendant intended to cause the victim fear or apprehension of immediate harm. *Id.* at 821.

Despite the lack of an objection, and despite the fact that trial defense counsel repeatedly asserted that the only issue in the case was the misidentification of his client as the culprit (rather than any element of the numerous crimes charged), *id.* at 819-820, the Appeals Court reversed the defendant's armed home invasion conviction. The prosecution's evidence was that the culprit had been chased by a police officer on foot, that the culprit had managed to take away the officer's gun in a struggle, and that the culprit shot the officer twice (and shot at but missed a neighborhood resident). A mother and her daughter, inside their home, heard gunshots outside and the son/brother in the household opened the side door, to find the culprit simply standing in the doorway with a gun. The man "just came on in ... just like normal walking, with a gun," whose barrel was pointing up. Asked what the problem was, the man said that "those punks"/ "white policemen" were after him. The woman told him to put down the gun, which he did, using his shirt to wipe it prior to resting it on top of the shirt on the floor. After asking for and receiving a mug of water, he left when the woman opened the door and asked if he was ready to go. The man never pointed the gun at the woman or her children and never threatened them with the gun. *Id.* at 812-813.

CRIMES: ARMED ROBBERY, SUFFICIENCY OF PROOF OF DANGEROUS WEAPON; JOINT VENTURER'S KNOWLEDGE OF WEAPON

As two youths stood, among others, on the Downtown Crossing subway platform, three men in a group approached them. One man approached one youth and told him in a low whisper to turn over a chain and bracelet he was wearing. The speaker reached into the inside pocket of his coat with his right hand and placed his hand on a shiny object which the victim believed was made of metal. The speaker then warned the victim not to "try to make a scene" or "something bad" would happen to him. The victim feared that he would be stabbed or shot or hit, and turned over his jewelry. The victim's friend was near enough to overhear these remarks, but when he started to move toward the victim to aid him, a man identified as the defendant told the friend not to watch or worry about what was going on. Both of these men began to leave the area; the third man who had entered the platform area with them joined them after initially indicating that he would try to get the jewelry back. *Commonwealth* v. *Colon,* 52 Mass. App. Ct. 725, 726-727 (2001).

The evidence was sufficient to prove beyond a reasonable doubt that the principal actor was armed. Germane to this determination was the nature, size, and shape of the object as well as the way in which it was handled, and the fact that the perpetrator of the robbery intended to provoke the victim's fear of a weapon. The Appeals Court further held that the evidence was

sufficient to prove beyond a reasonable doubt that the defendant was aware that the principal was armed with a dangerous weapon, given the actors' close proximity to each other. The Court also reasoned that the defendant could be inferred to have been an active coventurer when the group came onto the platform, and from this to infer that, given the public nature of the place, there needed to be a means by which to persuade the victim to surrender his property quickly and without resistance. *Id.* at 728-729. The Court did agree with the defendant, however, that the judge's failure to instruct the jury that the Commonwealth had to prove beyond a reasonable doubt that the defendant knew that the principal was armed with a dangerous weapon required reversal of the "armed" element of the robbery conviction: because the Commonwealth indicated that it would be content with this lesser conviction, the case was merely remanded for sentencing on the lesser crime. *Id.* at 730-731. In finding a substantial risk of a miscarriage of justice in the judge's failure to instruct the jury appropriately (no objection having been made by trial counsel to the omission), the Court rejected the Commonwealth's arguments (1) that the judge's general instruction on specific intent, i.e., that the jury could not find the defendant guilty as a joint venturer unless they found that he shared the intent required to commit the crime in all respects, was sufficient, and (2) that the error was harmless because the defense was misidentification and the joint venturer's knowledge of the principal's weapon was not an issue "actively contested at trial." *Id.*

CRIMES: "ATTEMPT" (TO COMMIT MURDER); OVERT ACT MUST BE CLOSE TO COMPLETED CRIME; SOLICITATION TO COMMIT FELONY

The prosecution contended that the defendant, an inmate, had undertaken to employ a hit man to kill his wife's ex-husband. This intended victim was the subject of an ongoing but unsuccessful restraining order; during the purported planning of his murder, the man had hidden inside the defendant's wife's residence and raped her after she had gone to bed one night. Although the defendant was convicted of "the statutory crime of attempted murder of four named individuals, G.L. c.274, §6," and "the common-law crime of soliciting others to commit those murders," the Appeals Court reversed the former convictions and ordered required findings of not guilty. The additional three intended victims, supposedly, were the defendant's parents and brother, so that the defendant would come into an inheritance by which to finance the "hit" of the first victim. *Commonwealth* v. *Hamel*, 52 Mass. App. Ct. 250, 251, further appellate review denied, 435 Mass. 1104 (2001). The Court sided with the view of Justice Holmes, as against the drafters of the Model Penal Code, in insisting that the "crucial overt act" which is an essential element of the crime of "attempt" must be one which was "dangerously close to the consummation of the object crime." (The Code, in contrast, "dwells on what the actor did toward attaining the substantive offense rather than on what he had yet to do[.]" *Id.* at 258.) The overt acts here consisted of the defendant supplying to the feigned hit men (police officers) sketches of his parents' house, front and back, and markings to show which rooms, reached through windows, might be vacant and which occupied, and written descriptions of the intended victims and their habits, and where they might be located. He conveyed more information orally on these topics, and on the additional topic of the location of a crop of marijuana, which was to be harvested by the hit man in partial payment for the job.

The Appeals Court approved of the jury instructions here given, i.e., that "[t]he overt act must ... be a real step toward *carrying out* the crime[,]" that "[p]reliminary preparations to commit a crime are not enough[,]" and that the overt act "must be the sort of act that you could reasonably expect to trigger a natural chain of events that will result in the crime, unless some

outside factor intervenes." But "there was nothing in the conduct of the defendant or the officers ... that could be found to reach the level of overt act as just defined." *Id.* at 260.

The Court affirmed the defendant's conviction for solicitation to commit a felony. It was irrelevant that "the crime counselled [was] not in fact committed." *Id.* at 261 (citations omitted). The defendant's argument that the judge was required to charge the jury as to an element of "specific intent" was rejected. "[A] solicitation charge as at common law pretty well carries with it a notion of purpose to which language of specific intent would add little, if anything." *Id.*

CRIMES: BURGLARIOUS IMPLEMENT POSSESSION; STANDARD INSTRUCTION HELD ERRONEOUS

The jury in the defendant's trial was instructed in accord with Massachusetts Superior Court Criminal Practice Jury Instructions §2.36, concerning possession of a burglarious implement. Jurors were told that proof of four elements was required for conviction in the particular case: (1) "the defendant knowingly possessed a tool[,] specifically a screwdriver or an ice pick"; (2) "the tool could reasonably be used to break into the building"; (3) "the defendant knew that the tool or the implement could reasonably [be] used for that purpose"; and (4) "the defendant had the specific intent of stealing the computer equipment from the building." The Appeals Court held the instruction incorrect, both because it omits the requirment that the defendant intend to use the tool to effectuate the breaking and entering, and because it emphasizes that the intent required must be to steal, rather than to use the implement to accomplish the break. *Commonwealth* v. *Redmond*, 53 Mass. App. Ct. 1, 6, further appellate review denied, 435 Mass. 1107 (2001). The defendant here did not object. While omitting from the jury instructions an essential element of the crime charged "is an error of constitutional dimension that violates the due process clause of the Fourteenth Amendment to the United States Constitution," for relief here, the error had to be found to present a substantial risk of a miscarriage of justice. Because the jurors could have found the defendant guilty merely because he possessed a pocketknife, without the intent to use it as a burglarious implement, the Court reversed the conviction. *Id.* at 8.

CRIMES: CIVIL RIGHTS VIOLATION (BY THREAT/ FORCE WILFULLY INJURE, INTERFERE WITH/ THREATEN OTHER PERSON IN EXERCISE OF RIGHT/ PRIVILEGE) (G.L. c.265, §37)

When a married couple became aware that their long-term neighbors were a homosexual couple, their previously cordial relationship changed. The wife in the married couple attended a party at the victims' home and became so antagonistic that other guests complained. She was asked to leave, and did so, albeit with angry words. Several days later, an unsigned note was found on a patio table at the victims' home. It read, "Go back into your closet and stay there." This prompted a call to the police, and an exchange of insults between the neighbors. The next day, the husband of the couple barged past his neighbor's seventy-one-year-old mother to enter the house, uttering obscenities and threatening to "kill you f---ing faggots" and take them outside and "f--k" them up, and that he would kill them if they did not stay off the streets. Both the victims were intimidated and frightened by this; the police were called twice, and they removed the man from the house upon their arrival. About five weeks thereafter, the homophobic neighbor wife posted three signs on her porch, facing the victims' home. One read "Watch your young boys at all times. They're into chickens"; another read "Remember Jeffrey [Curley], he was murdered for sex by two homosexuals call your representative ask for the death penalty!!!";

the third read "Protect our police, women and children call your representative ask for the death penalty to pass." The signs were posted for about five and a half hours, and the wife pointed out the signs to passing motorists, who would stop, get out of their cars, and look to the victims' home. The husband thereafter screamed at the elderly mother of one victim and screamed to the victim to stay off the streets or he would "f---ing kill [him]." The wife also taunted the victim, challenging him to a fight on the street, "woman to woman," and saying "You haven't seen anything yet, just wait." The victim would not leave his property, fearful that he would be beaten by the larger and stronger husband. *Commonwealth* v. *Pike*, 52 Mass. App. Ct. 650 (2001).

The Appeals Court rejected the wife's argument that she had been entitled to a required finding of not guilty at her trial on a criminal complaint brought against her under G.L. c.265, §37 ("no person ... shall by force or threat of force, willfully injure, intimidate or otherwise interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws ..."). The cloak of "free speech" did not cover the wife's conduct, and "[w]hen the content of [her] statements [was] considered in light of the circumstances in which she made them, [the Court thought] it clear that they constituted threats of force within the comprehension of [the criminal statute]." *Id.* at 654.

In rebuffing claims of ineffective assistance of trial counsel premised upon his failures to object to certain evidence and instructions and to challenge the statute's constitutionality, the Court rejected the premise that the unsigned note had been inadmissible for lack of authentication. There was sufficient circumstantial evidence from which it could be inferred that the wife authored the note left on the table. *Id.* at 655.

CRIMES: DRUGS; INTENT TO DISTRIBUTE

When police officers pursued a speeding car at 3:30 a.m. in a "high crime" area, the car "rolled through a stop sign and stopped in the middle of an intersection." The defendant emerged from the passenger side, looked to the right and left, and fled, clutching his chest as if holding something in his shirt. Officers pursued the defendant, and saw him toss a plastic bag onto the roof of a two-story building. That bag contained 244.41 grams of cocaine with a street value of $25,000. On the defendant's person were four baggies of marijuana and a beeper. *Commonwealth* v. *Wilson*, 52 Mass. App. Ct. 411, further appellate review denied, 435 Mass. 1108 (2001).

The defendant was not entitled to have the jury instructed on the offense of simple possession of cocaine. At trial, he contended that the cocaine had been slipped into his jacket pocket, and that he did not thus "knowingly" possess the cocaine. The distributive intent element of the cocaine trafficking charge was not in dispute at trial, and given the quantity involved, "the judge was warranted in refusing to give a simple possession charge to the jury." *Id.* at 419.

As to the "intent to distribute" element of the marijuana charge, however, the Appeals Court held that the defendant was entitled to a required finding of not guilty. There was no evidence concerning the amount of marijuana involved, except that it fit in the defendant's pants pocket, and no expert testimony regarding the practices or accoutrements of distribution of marijuana. In these circumstances, the fact that the defendant obviously possessed a different drug with the intent to distribute did not have sufficient "inferential value" to prove, beyond a reasonable doubt, the intent to distribute the marijuana. *Id.* at 419-421.

CRIMES: LARCENY IN A BUILDING (G.L. c. 266, §20); LESSER INCLUDED OFFENSE

OF LARCENY UNAVAILABLE ON EVIDENCE HERE

The offense of larceny in a building requires proof that the defendant (1) took property (2) which belonged to another (3) from a building (4) with the intent to deprive that person of the property permanently. With regard to element (3), "it is not sufficient merely to show that the property was in a building at the time it was stolen. Rather, 'it is necessary to show also that the property was under the protection of the building, placed there for safe keeping, and not under the eye or personal care of someone in the building.'" *Commonwealth* v. *Barklow*, 52 Mass. App. Ct. 765, 766-767 (2001) (citation omitted). The Appeals Court refused to hold that proof of the third element required proof that no person was in the building at the time of the theft. Apart from that holding, however, the proof in the case under consideration was that the building was empty, the store owner having closed his shop at 10 p.m., and the break-in having occurred between that time and about 3 a.m., when the owner returned to find the back door ajar and items purloined from the store's inventory. Given this evidence, there was no rational basis for a finding of not guilty on the indisputably "greater" offense of larceny in a building and conviction instead on the lesser included offense of simple larceny. Refusal to instruct the jury on mere "larceny" was not error. *Id*. at 768.

CRIMES: MALICIOUS DESTRUCTION OF PROPERTY NOT ESTABLISHED BY DAMAGE TO DOORS, WINDOW, AND SECURITY ALARM INCIDENT TO BREAKING AND ENTERING & LARCENY

The prosecution's case was that the defendant had gained access to the interior of a building in downtown Boston, and had triggered the security alarm early one February morning. The back door of the building was propped open with a box, and computer equipment was stacked just inside the door. On the fourth floor of the building, the front door of the Jobs for Youth office appeared to have been forcibly opened (lock damaged, door frame gouged, wood chips littering the floor), and another door which led to the computer room inside the office "appeared kicked in and bore other indicia of forcible entry," including gouge marks and a bent deadbolt lock. The security alarm had also been smashed, and a window was broken. Although the defendant was charged with, and convicted of, breaking and entering with felonious intent, possession of a burglarious implement, and malicious destruction of property of a value over $250, the Appeals Court ordered of a required finding of not guilty on the malicious destruction charge. The damage to property here "was nothing more than 'the adventitious by-product of a wholly discrete criminal enterprise' (the theft of the computers) and was not 'gratuitous, excessive violence purposefully designed to intimidate and overpower,' ... or destructive acts that were by design and hostile to the owner of the property, whoever that may have been." *Commonwealth* v. *Redmond*, 53 Mass. App. Ct. 1, 5, further appellate review denied, 435 Mass. 1107 (2001) (citations omitted). The opinion stated that the damage here was probably "wanton destruction of property," for which the defendant was not indicted, and which is not a lesser included offense of malicious destruction. *Id.*

CRIMES: OPERATING MOTOR VEHICLE AFTER LICENSE REVOCATION DUE TO CONVICTION OF OPERATING UNDER INFLUENCE OF LIQUOR (G.L. c.90, §23)

The defendant was convicted of violating G.L. c.90, §23, second paragraph: he allegedly operated a vehicle after his license to operate was revoked for a violation of G.L. c. 90, §24, operating under the influence of liquor. At trial, the Commonwealth introduced certified copies of three registry notices addressed to the defendant at 161 Winter Street, Hanson, informing him

that his right to operate a vehicle had been revoked. The notices were dated July 1, 2, and 3, 1997, and indicated a number of "DWI Liquor" convictions as well as convictions for driving to endanger, having no liability insurance, and leaving the scene of an accident after causing property damage. The defendant argued on appeal that these notices were inadmissible, and that they should have been redacted, at the very least, to delete information about any offenses other than "DWI Liquor." He also argued that there was a failure of proof of notice of revocation, as the notices were sent to an address other than the one on his license. *Commonwealth* v. *Blake*, 52 Mass. App. Ct. 526 (2001).

The Court rejected the latter contention on the questionable ground that on July 31, 1997, when he was cited for the violation for which he was being tried, he told the officer that the address on his license was wrong, and that it was instead the Winter Street address. The Court implicitly held that this evidence was sufficient to establish beyond a reasonable doubt that the defendant had been at that address less than a month earlier, i.e., when the notices were sent. *Id.* at 530. The notices were admissible because the prosecution was required to prove, as an element of the offense charged, that the license revocation had been on the ground of operating under the influence of alcohol. While the judge should have redacted the extraneous entries on the notice, the Appeals Court held that the error was "harmless in light of the overwhelming evidence against the defendant." *Id.* at 528-529. Because the prior conviction of operating under the influence was an element of the G.L. c. 90, §23, second par., offense to be proved, and not merely a sentencing enhancement factor, the defendant was held not to have been entitled to a bifurcated trial under G. L. c. 278, §11A, i.e., when a second "trial" is necessary for proof of the prior conviction of operating under the influence of liquor.

CRIMES: RAPE, SUFFICIENCY OF EVIDENCE OF LACK OF CONSENT

The defendant was convicted of aggravated rape and of first degree murder on the basis of both extreme atrocity or cruelty and felony-murder, aggravated rape being the underlying felony. In a pro se brief, the defendant argued that he had been entitled to a required finding of not guilty on the rape charge, and thus on the felony murder charge as well. This argument was premised, at least in part, upon the lack of evidence of semen in or on the victim's person. It was, perhaps, also premised upon the fact that the only explicit evidence about sexual intercourse came from the defendant's admission to police that he had had intercourse, albeit consensually, with the victim at a time prior to the homicide, and a legal argument that disbelief of consensual intercourse is not proof of nonconsensual intercourse, i.e., rape. The SJC held, however, that the evidence was sufficient here. "The presence of semen is but one way of proving penetration." *Commonwealth* v. *Miller*, 435 Mass. 274, 278 (2001). There was evidence that a neighbor had heard a woman's voice coming from the victim's apartment cry out, "Don't, don't, no," followed by a bang and silence. When the victim was found dead, lying on her back, nude, there were significant injuries to her head, neck, anal, vaginal, and groin areas, and she had suffered "defensive wounds to her hands and arms." She died from multiple stab wounds, but there was also evidence of blunt force trauma and asphyxiation. The victim's underwear was found on the floor away from folded clothing she had been wearing when last seen alive. *Id.* at 276.

CRIMES: "SECOND OR SUBSEQUENT OFFENSE" ELEMENT; NECESSITY OF EQUATING PRIOR OFFENDER WITH CURRENT DEFENDANT

See *Commonwealth* v. *Zavala*, 52 Mass. App. Ct. 770, 777-779 (2001), summarized at ***TRIAL PROCEDURE: REVERSAL FOR ALLOWING COMMONWEALTH TO***

SUPPLEMENT ITS PROOF AFTER MOTION FOR REQUIRED FINDING OF NOT GUILTY.

DEFENDANT: RIGHT TO BE PRESENT; REMOVAL FROM COURTROOM

At trial, the defendant asked, within the hearing of the jury, for additional time to examine a document characterized "for the jury's benefit as 'hundreds of pages.'" The judge at sidebar directed defense counsel to warn the defendant that he would be removed from the courtroom for further "outbursts." The defendant nonetheless later that day stated in front of the jury a desire for counsel to proceed with cross-examination and said that counsel was declining [only] because she did not have the discovery that she had asked for. He added that he "deserve[d] a fair trial here," and "repeatedly spoke over the judge who was attempting to interrupt the outburst," ignoring the judge's directions to be seated. Calling the outburst "disorderly, disruptive and disrecspectul," the Appeals Court believed it to have been "strategically calculated to convey to the jury that the defendant was not being afforded a fair trial because the prosecution was withholding discovery documents and, alternatively, ... to provoke a mistrial in a case that was going badly." The Court found no error in the judge's having the defendant removed from the courtroom in the circumstances. He was returned some thirteen transcript pages later, after responding positively to a note from the judge. *Commonwealth* v. *North*, 52 Mass. App. Ct. 603, 618-619, further appellate review denied, 435 Mass. 1108 (2001).

DEFENDANT: RIGHT TO BE PRESENT AT INDIVIDUAL VOIR DIRE

After jury deliberations had begun, the trial judge had occasion to discharge a juror: she had recognized, somewhat belatedly, that the defendant and defense witnesses were members of the cleaning crew at the large office building in which she worked. The defense relied upon the defendant's time card and the testimony of fellow employees to establish that he had been at work at a time which would have made the rape complainant's testimony false. On appeal of his convictions, the defendant did not argue that the judge had erred in finding that the juror could not be fair and impartial. He argued, however, that he should have been allowed to be present when the judge, at defense counsel's request, questioned the remaining jurors individually about what the discharged juror had said to them before discharge, e.g., about her workplace or the working procedures of the cleaning crew. Although the judge barred the defendant's presence on the ground that deliberations were ongoing, this was "serious error." *Commonwealth* v. *Dosanjos*, 52 Mass. App. Ct. 531, 535, further appellate review deied, 435 Mass. 1106 (2001). Because the defendant could offer only that "the jury might have engaged in adverse speculation about his absence from the voir dire," the Court was able to find that the exclusion of the defendant was harmless beyond a reasonable doubt. *Id.* at 537. ***Practice tip.*** The defendant had urged, unsuccessfully, that the jurors would have inferred that the excused juror was somehow fearful of the defendant and defense witnesses, and that this inference would have resounded to his detriment in determinations of credibility. It would have been better for the judge to instruct the remaining jurors that the reason for the discharge of the juror was entirely personal and had nothing to do with her views on the case or her relationship with the other deliberating jurors. Defense counsel did not object to this omission, however. *Id.* at 536 and n. 4.

DEFENSES: ENTRAPMENT; "BOWDEN" / INADEQUACY OF POLICE INVESTIGATION; JURY INSTRUCTIONS NEGATING "BOWDEN" DEFENSE

A paid informant for drug cops claimed that his brother had introduced him to Remedor,

and that he had purchased about 112 grams of crack cocaine from Remedor the first time they met. The site of this sale was placed under continual surveillance; two sales were made at this site later to the informant and the undercover trooper accompanying him. The latter such sale was prearranged by telephone, and Remedor at the appointed time got into the trooper's car, showing her the drugs prior to her counting out the cash to give him. This counting was cut short by arresting officers, who arrested Remedor after a short foot chase. The former sale, however, involved the informant showing Remedor the money and thereafter waiting with the money and the trooper in their car. One half hour later, presumably at the behest of the defendant Remedor, a taxicab (apparently in the area initially) "returned" to the location and its operator emerged and handed a bag of cocaine to the undercover trooper in exchange for the cash. The operator was not arrested at the time, "and the record does not disclose the time or circumstances of his subsequent arrest." At trial, however, thirteen months later, the defendant Patrick Paul was identified as the cab driver. *Commonwealth* v. *Remedor*, 52 Mass. App. Ct. 694, 698, further appellate review denied, 435 Mass. 1107 (2001).

Paul's defense at trial was misidentification. It emerged that at all times when the investigators met the defendants, they were wearing body wires beneath their clothing. The undercover trooper testified, unexpectedly, that the transmissions were not recorded because they would have been required to have a "*Blood* warrant, in essence a search warrant, to seize the conversation[,]" and these transmissions were "for officer safety only." Paul's attorney argued that a recording would have been lawful without a warrant (and this contention was said by the Appeals Court to have been correct, given the reasonable suspicion of a nexus to organized crime, given the quantity involved or the mere fact of retail street sales of cocaine), and that he should be allowed to argue the omission in support of his defense that better prosecution work would have yielded a more reliable identification of the second seller. *Id.* at 697-698. The judge did permit defense counsel to argue that the transactions could have been audio and/or video - recorded with or without a warrant, but did not include any instruction on the Commonwealth v. Bowden [379 Mass. 472 (1980)] defense in her charge to the jury. *Id.* at 698.

The jurors quickly sent a question to the judge: "If audio or video tapes had been made (without a warrant) would they have been admissible as evidence?" After discussing the question with counsel, the judge told the jurors that the question "d[id] not need to be answered," and was "a hypothetical abstract question." She admonished the jury to "decide this case on the evidence presented" and told them "not to decide the case based upon any guesswork. ...Do not guess about evidence not presented. Confine yourselves to the evidence you have heard and seen. The jury is to confine their deliberations to the evidence and nothing but the evidence." *Id.* at 699 n. 4. The Appeals Court held that this instruction effectively eviscerated the permissible Bowden defense and, despite the absence of an explicit objection, reversed Paul's conviction. "That the instruction would have misled the jury appears from the question they posed. The jury were obviously focusing on the investigative omissions in their deliberations. When they were admonished not to consider the deficiencies in the Commonwealth's case, the effect was to eliminate a strong reasonable doubt raised by the defendant's identification defense." *Id.* at 701.

The defendant Remedor was not successful, however, in his contentions (1) that a defense of entrapment was available on the evidence at trial, and (2) that the judge erred in responding to the jury's spontaneous question, "Does the law allow us to consider a legal defense which has not been presented, specifically: entrapment or encouragement to commit a crime?" *Id.* at 705 n.6. The judge answered that while the law does allow consideration of a legal defense which has not been presented, the law requires jurors to decide the cased based on the evidence,

that the jurors "are precluded from considering somoething that is not raised by the evidence at all," and that they must limit themselves to "the evidence that you have heard and seen." *Id.*, n. 7. While the Court was "trouble[d]" by the cited portions of the instructions (which may be seen as dictating what inferences were [un]available from the evidence), *id.* at 705, the Court also believed that the trial evidence did not fairly raise the entrapment issue. The defendant Remedor's willingness to sell cocaine without any prodding from the government was shown by the informant's testimony. The fact that he could not deliver the quantities or types of cocaine or guns he apparently promised "d[id] not negate predisposition," but instead "illustrate[d] his willingness to expand the enterprise." *Id.* at 704. If there had been an objection **SPECIFICALLY** to the troublesome portions of the instruction, the result MIGHT have been different. The Appeals Court gave no credit for the defendant's general objection when the judge told counsel the response she planned to give. *Id.* at 705-706.

DEFENSES: SELF-DEFENSE; "CASTLE LAW" (NO DUTY TO RETREAT IF IN OWN HOME)

See *Commonwealth* v. *Peloquin*, 52 Mass. App. Ct. 480, **further appellate review allowed, 435 Mass. 1104** (2001), summarized at ***COUNSEL, INEFFECTIVE ASSISTANCE OF: FAILURE TO OBJECT TO JURY INSTRUCTIONS IMPOSING DUTY OF RETREAT IN SELF-DEFENSE CASE; APPLICABILITY OF "CASTLE" LAW.***

DISCOVERY: PRIVILEGED RECORDS; "BISHOP-FULLER" UNDER ATTACK

The defendant had not been required to make the impossible showing required under Commonwealth v. Fuller, 423 Mass. 216 (1996), for access to privileged records, because his motion for such access was allowed prior to that decision. Thereafter, though, the same motion judge ruled that the records could not be used at trial because the court found "no exculpatory evidence" within them. Both the Appeals Court and the Supreme Judicial Court found otherwise, reversing the defendant's conviction of rape of a child because he was denied the opportunity to effectively confront the complainant and present a defense: the records contained information which would have supported his claims that the complainant had fantasized the alleged sexual conduct. In so finding, the Court rejected the Commonwealth contention that the records would not have been helpful, because they attributed the complainant's difficulties with reality and flights into fantasy to the purported sexual assault. While the latter point was true, the records "at least provide[d] a basis for the premise that the child's fantasies predate[d] the alleged rape and were the result of his grandmother's death and the absence of a father in his life. ... To the extent that the records were damaging to the defense (by suggesting that the alleged rape did in fact occur), it was for defense counsel to decide whether their value outweighed their harm. Counsel was deprived of the ability to make that choice by the judge's ruling." *Commonwealth* v. *Sheehan*, 435 Mass. 183, 189-190 (2001).

The opinion was even more noteworthy, however, for its dueling opinions, one of which suggested that at least three members of the Court would vote to do away with the convoluted "Bishop-Fuller" procedure. "The irony of today's decision — ordering a new trial because the judge excluded treatment records that, under current law, THE DEFENDANT WOULD NEVER BE ALLOWED TO SEE — is disturbing." *Id.* at 198 (Sosman, J., concurring) (emphasis added). Under the current regimen, one is required to "demonstrate what important exculpatory evidence is in documents that one has not seen," usually an impossibility. *Id.* It does not "belittle" the privileges of immense importance to victims and witnesses "[t]o say that a

defendant's right to a fair trial is of greater weight." The latter is a constitutional right; the former are legislatively-created privileges. *Id.* at 196 and n. 4.

DISCOVERY: PUBLIC RECORDS STATUTE; "WORK PRODUCT" BASIS FOR WITHHOLDING DOCUMENTS REJECTED

A town's police chief was the subject of a criminal investigation by the Attorney General. The investigation was prompted by town selectmen's request for a review of allegations against the police chief made by a number of the town's police officers, but in the end, the assistant attorneys general found no evidence of criminal wrongdoing and suggested that any grievances be handled administratively by the selectmen. The police chief thereafter filed a civil suit against the town, various town officials, and several police officers for their roles in triggering the investigation. The chief's attorney sought access to the Attorney General's investigation file pursuant to the public records statute, G.L. c.66, §10. Wanting to shield those witnesses interviewed by the assistant attorneys general, the Attorney General withheld most of the requested material on the basis of an "implied exemption for materials covered by ... the work product doctrine." Materials privileged as work product under M.R.Civ.P. 26(b)(3) are not, however, protected from disclosure under the public records statute, unless some particular exemption within the public records statute is applicable. Furthermore, "[t]here exists no blanket exemption for police records or investigation materials." *Antell* v. *Attorney General*, 52 Mass. App. Ct. 244, 248 (2001).

Notwithstanding those black-letter holdings, however, the Appeals Court remanded the case to permit appropriate redactions which could serve to preserve the anonymity of voluntary witnesses. Some of those witnesses could be police officers who continued to be supervised by the police chief, and "[d]isclosure of their identities may expose them to unjustified cricisim or animus by their supervisors or colleagues and could lead to further discord within the department." *Id.* ***Practice tip.*** The fact that the civil suit had been settled prior to this appellate decision did not make the issue moot, because the public records statute has no "standing" requirement, "but extends the right to examine public records to 'any person' whether intimately involved with the subject matter of the records he seeks or merely motivated by idle curiosity." *Id.* at 245 n.1, quoting from Bougas v. Chief of Police of Lexington, 371 Mass. 59, 64 (1976).

DISCOVERY, RECIPROCAL: PSYCHIATRIC EXAM OF DEFENDANT BY COMMONWEALTH EXPERT

Three weeks before trial and almost a year after "the reciprocal discovery order deadline had passed," the defendant informed the court that he planned to call an expert witness to testify to the defendant's state of mind as it affected the degree of guilt, but that he was not raising a defense of lack of criminal responsibility. The Commonwealth filed a motion requesting that its expert be allowed to examine the defendant. Fifteen days before trial, at the conclusion of a hearing, the judge allowed the Commonwealth's motion; defense counsel argued that there was no authority for such a Blaisdell examination, since "criminal responsibility" was not being raised, and the defense expert was not offering an opinion but would only provide "background information." Counsel stated that he would not agree to "turn over" his client for the exam, and would appeal to the single justice of the SJC if the judge allowed the Commonwealth's motion. The judge allowed the motion, and the Commonwealth's expert interviewed the defendant six days later. Defense counsel learned of the exam two days after it occurred, and argued that the Commonwealth's expert's testimony had to be excluded because the defendant had been

deprived of his right to counsel in deciding whether to submit to the examination. The SJC held otherwise. *Commonwealth* v. *Contos*, 435 Mass. 19, 25 (2001).

The Court termed "disingenuous" counsel's assertion that he expected to be notified in advance of the examination, because he had to know that any exam had to occur almost immediately because of the imminent trial date, and that the Commonwealth was required to schedule and attempt to have its expert examine the defendant in order to preserve its right to object to admitting the defense expert's testimony in the event that the defendant refused to submit to the prosecution expert's exam. Furthermore, after the trial of this case, the Court held (in Commonwealth v. Diaz, 431 Mass. 822, 830 [2000]) that orders allowing Commonwealth experts to conduct psychiatric examinations are not limited to cases in which the defense is a lack of criminal responsibility: "[t]he policy justifying reciprocal discovery when the defendant places his statements and mental state in issue applies with equal force to an alleged inability to premeditate or form a specific intent to kill as it does to the lack of criminal responsibility defense raised in Blaisdell." 435 Mass. at 24 n.7.

What the defendant was trying to do here was use the defense expert to place before the jury the defendant's out-of-court statements about his state of mind when he killed his girlfriend and their two children, purportedly immediately after she threatened to reveal their collective existence to the defendant's wife, without subjecting the defendant to the hazards of cross-examination at trial. (Defense counsel did not call on the expert to express any opinion because, as elicited by the prosecutor on cross, even the defendant's own expert opined that he suffered from no mental disease or defect that could have impaired his ability to form a specific intent, or to control and understand his actions.) The trial judge repeatedly instructed that the defendant's statements were not admitted for their probative value, and could not be treated as evidence of the truth of the matters contained within the statements, but were only to be considered as bases of any opinion that the expert might testify to. This, said the SJC, was the correct treatment of the statements. Accordingly, the defendant's argument that he had been entitled to a voluntary manslaughter instruction failed: only substantive use of the statements would have provided any basis for believing there to have been "provocation." *Id.* at 22.

DOUBLE JEOPARDY: "ELEMENTS" TEST ESCHEWED FOR PRACTICAL REALITY, BARRING DOUBLE SENTENCES (THOUGH NOT DOUBLE CONVICTIONS)

According to the prosecution's case, the defendant forced his way into an apartment when a woman began to open the door. He grabbed her wrist to restrain her, he touched her breasts through her clothing, and he reached under her shorts and touched her underwear in the area of her hip. As he attempted to pull down her shorts, he told her that "he knew that [she] wanted it" and that "he wanted to screw [her] in the ass." He left when she managed to pull open the apartment door and scream into the hallway. The defendant was convicted of assault with intent to rape, indecent assault and battery, and assault and battery. Sentences imposed were two consecutive terms of two and one-half years in the house of correction, and a "split" sentence, one year to be served directly and the remainder suspended during five years of probation. The latter sentence (for assault and battery) was to be served concurrently with the sentence for indecent assault and battery. On appeal, the defendant argued that the indictment for assault and battery was duplicative of the one for indecent assault and battery, and the indecent assault and battery indictment was duplicative of the one charging assault with intent to commit rape. *Commonwealth* v. *Morin*, 52 Mass. App. Ct. 780, 785-786 (2001).

The Appeals Court believed that the defendant could lawfully be tried "for multiple

crimes that constitute the 'same offense' for double jeopardy purposes" so long as it was done "in a single proceeding." *Id.* at 786. The Court was willing, however, to bar multiple punishments "for convictions arising out of the same act." *Id.* That said, the Court found the wrist grab to have been the assault and battery, and the breast touching to have been indecent assault and battery, and believed that there were "not so closely related as to constitute a single course of conduct," making sentencing on each conviction okay. *Id.* at 787. The Court held, however, that the defendant could not be sentenced on the indecent assault and battery conviction because it was duplicative in fact with the assault with intent to rape conviction. *Id.* at 788. (The prosecution wanted the sequence parsed so as to have the assault to rape indictment premised upon locking the complainant in the apartment, telling her he wanted to have anal sex, and attempting to pull down her shorts, and the indecent assault and battery conviction premised upon the breast touching. *Id.*)

DOUBLE JEOPARDY: UNIT OF PROSECUTION

The prosecution contended that the defendant had defrauded four different families through a pyramid scheme of investments, and obtained convictions on twenty separate indictments charging larceny by false pretenses. Although the defendant argued on appeal that there was a single larcenous scheme, such that he should have been convicted of no more than four larcenies (one for each client), the Appeals Court noted that "the defendant committed a multitude of separate acts on different dates by differing artifices," and that the Legislature would not reasonably have intended the defendant's construction. *Commonwealth* v. *North*, 52 Mass. App. Ct. 603, 606, further appellate review denied, 435 Mass. 1108 (2001).

DOUBLE JEOPARDY: UNIT OF PROSECUTION

On two separate occasions, involving two different victims, the defendant and an accomplice "robbed a man of his wallet, money, and automatic teller machine (ATM) card at knife point in a deserted location, extracted the victim's personal identification number (PIN) by threats, and used the ATM card to withdraw money from the victim's bank account." On appeal, the defendant argued that his convictions of larceny of property over $250 should be dismissed because larceny is a lesser included offense of robbery. The Appeals Court, however, rejected his argument that the armed robbery and larceny counts were but "a single scheme precluding prosecution on separate indictments." *Commonwealth* v. *Baldwin*, 52 Mass. App. Ct. 404, 406, further appellate review denied, 435 Mass. 1104 (2001). "Not only was different property taken at different times and different locations in different circumstances, neither robbery was continuous with the subsequent larceny. The extortion of the PIN necessarily intervened." *Id.* at 407.

The Appeals Court did find a related issue, sua sponte. Although the defendant was convicted on two counts of larceny over $250, the money taken from the ATM was only $200 in each instance. In order to reach the dollar value required for the "over $250" elements, the prosecution relied upon the property taken in the separate armed robberies, e.g., a watch, and cash from the wallets. The larceny indictments were remanded for resentencing "in accordance with the value of the money taken in the larcenies, which was in each case less than $250." *Id.* at 408.

DOUBLE JEOPARDY: WAIVER OF ISSUE; "SAME" OFFENSE; SUCCESSIVE PROSECUTIONS

A fourteen-year-old juvenile took his brother's car and drove it very recklessly, striking a girl from behind and causing her numerous injuries. Within a week after this event, the juvenile pleaded delinquent to motor vehicle offenses (unauthorized use, unlicensed operation, operating unregistered vehicle, operating uninsured vehicle, negligent operation so as to endanger), and a judge committed him to DYS after finding sufficient facts to warrant adjudication. The admissions formed the basis of a probation surrender on a prior case. At the time of this disposition, both the prosecutor and the judge told the juvenile that the Commonwealth would be proceeding separately against him on a charge of assault and battery by means of a dangerous weapon. The juvenile acknowledged his understanding of this prior to entering his pleas. Thereafter, the Commonwealth obtained two "youthful offender" indictments, one for ABDW, and one for reckless operation of a motor vehicle. The defendant moved to dismiss the reckless operation charge (but NOT the ABDW charge) on the ground of double jeopardy, and the Commonwealth voluntarily dismissed that charge. A six-person jury convicted the defendant of ABDW, but the presiding judge, sua sponte, vacated the verdict and dismissed the indictment on the ground that the earlier delinquency disposition on the negligent operation so as to endanger charge "precluded subsequent prosecution for the assault charge." The Commonwealth appealed, and the Appeals Court reinstated the ABDW conviction. *Commonwealth* v. *Bennett*, 52 Mass. App. Ct. 905 (2001).

First, the Court held that when the juvenile proceeded to dispose of the delinquency charges after notice that further charges would be forthcoming, "he waived his right to assert double jeopardy in subsequent proceedings involving different offenses arising out of the same occurrence." *Id.* at 906. (This is an extremely dubious proposition: it was not the defendant's burden to ensure that the prosecution came up with all the charges it wanted at the earliest possible time, and notice to him that the Commonwealth intended to violate the double jeopardy bar is not, logically, a waiver by the defendant of its protection.) Even if this wasn't a knowing and voluntary waiver, said the Court, the defendant waived the issue by failing to file a motion to dismiss the youthful offender ABDW indictment prior to the ABDW trial, i.e., when he filed the motion to dismiss the reckless operation of a motor vehicle indictment. *Id.* The Court did not want to agree that the judge's sua sponte posttrial consideration of the double jeopardy point "resurrected the issue," but even if it did, the offenses were not the "same" because, on a strict "elements" test, ABDW was not the "same" as any offense adjudicated in the juvenile court previously. *Id.* The Appeals Court did acknowledge emerging caselaw suggesting that the "elements" test provides insufficient double jeopardy protection under Massachusetts common law when *successive prosecutions* are involved (rather than a single trial resulting in multiple punishments), *id.* at 906-907, citing Commonwealth v. Arriaga, 44 Mass. App. Ct. 382, 391-392 (1998), but refused to apply that "non-elements" test here in the absence of explicit direction from the Supreme Judicial Court.

EVIDENCE, LOSS OF

The defendant was charged with defrauding a number of victims through a pyramid scheme of investments. He fled the country while on bail and under electronic monitoring, and this was introduced as evidence of consiousness of guilt. The defendant testified, however, that he fled because he feared for his safety and that of his family, and wanted to introduce, to corroborate this claim, particular evidence seized by police in a search of his vehicle or turned over to police by the defendant. One item of evidence, an audiotape containing a muffled male voice stating, "I know where you live and/or I know where your children are," had been taped

over by police inadvertently, and another audiotape could not be found due to the absence on vacation of a particular officer. As to letters similarly unavailable, the trial judge allowed admission of copies of them, they being the next best evidence. The defendant argued on appeal that he had been deprived of his right to compulsory process and, additionally, that the judge should have instructed that the jury could make an inference adverse to the prosecution due to the absence of the cited evidence. The Court believed that the trial judge acted reasonably. Testimonial evidence about the content of the missing audiotapes was received from the defendant and an officer, and included descriptions by the defendant about the intonation, volume and quality of the voice on the tape, as well as its effect on him. Furthermore, the tape was "only marginally relevant to rebutting the consciousness of guilt inference arising from" the defendant's flight. One audiotape was of a communication made before May 28, 1993; the defendant did not flee until September, 1994. *Commonwealth* v. *North*, 52 Mass. App. Ct. 603, 609, further appellate review denied, 435 Mass. 1108 (2001).

EVIDENCE: DEOXYRIBONUCLEIC ACID (DNA) TESTING / EVIDENCE HELD ADMISSIBLE DESPITE NUMEROUS CHALLENGES

The particulars of the challenges and analyses being beyond the scope of this publication, please consult *Commonwealth* v. *McNickles*, 434 Mass. 839 (2001), for recent DNA-admissibility caselaw.

EVIDENCE: IMPEACHMENT BY PRIOR CONVICTIONS; EXCLUSION OF SPECIFIC CRIME, LENGTH OF SENTENCE; PRESERVATION OF ISSUE (STANDARD OF REVIEW)

At his trial for armed assault with intent to murder and related charges, the defendant moved that the Commonwealth not be allowed to introduce a prior conviction for manslaughter to impeach the defendant's credibility if he testified in his own behalf. The motion was denied. Prior to deciding whether the defendant would take the stand, defense counsel asked that the judge's ruling be modified to exclude the precise charge on which he had been convicted, and instead assert simply a "felony." The judge agreed, but stated, "for defense counsel's benefit, the proposed impeachment question, which included a mention of the length of sentence." Following a two-minute conference between the defendant and his attorney, the attorney informed the judge that the defendant would not take the stand. *Commonwealth* v. *Kalhauser*, 52 Mass. App. Ct. 339, 345, further appellate review denied, 435 Mass. 1105 (2001). If the party to be impeached expressly requests that the precise conviction (here, manslaughter) be obfuscated by use of the generic "felony," a judge has discretion to allow this substitution. But the judge here erred in ruling that impeachment of the defendant with prior convictions (G.L. c. 233, §21) may include the length of his sentence. *Id.* at 343.

"The mention of the sentence has the potential to cause unfair prejudice to the witness by inviting the jury to speculate about the details and seriousness of the conviction and consider the conviction for reasons other than credibility." *Id.* When a party is allowed to use a conviction to impeach a witness, the party "is limited to establishing the identity of the witness as the person named in the record." *Id.* at 344. Details of the conviction, including the victim's name and circumstances surrounding the event, may NOT be mentioned. Only if the witness attempts to deny or equivocate about the existence of the conviction itself may the questioner "use the facts contained in the record of conviction [including the length of sentence] to establish the identity of the witness as the person named in the conviction." *Id.*

Because the defendant did not make any objection to the judge's stated intention to include the length of sentence, the judge was said not to have been given any opportunity to cure the error, and the issue was thus held "unpreserved." On the applicable standard of review, i.e., "substantial risk of a miscarriage of justice," the convictions were affirmed. If the case had been one presenting a possible "classic duel of credibility," instead of abundant circumstantial evidence, including motive, and copious "consciousness of guilt" inferences (including flight from the Commonwealth for fifteen years), the Court would have been more amenable to finding such a risk of a miscarriage of justice. *Id.* at 346.

EVIDENCE: EXPERT'S "OPINION" OF GUILT

A police officer who was conducting surveillance for drug activity testified as to the meaning of a drug "stash," and then opined that the defendant was stashing narcotics in the area of a water hose. This was inadmissible incompetent testimony, but there was no objection by trial counsel. Given the evidence at trial, the Appeals Court did not believe that the error created a substantial risk of a miscarriage of justice. *Commonwealth* v. *Zavala*, 52 Mass. App. Ct. 770, 775-776 (2001).

EVIDENCE: "FACSIMILE" OF GUN

At the trial of the defendant for armed assault with intent to murder, carrying a firearm, and other charges, the prosecution was allowed to show to the jury a .25 caliber-type handgun similar to one which witnesses saw the defendant carrying on several occasions prior to the shooting at issue. Three witnesses testified that it was "similar" in size and color to one which they had seen the defendant carry within two weeks before the shooting. An expert testified that the shots fired in this case were from a .25 caliber weapon. The Appeals Court held that there was no error: the judge "made certain that the jury understood the illustrative purpose of the prototype by instructing it was not the defendant's weapon." Further, "the facsimile was relevant to prove that the defendant's gun had a barrel of less than 16 inches," a necessary element of the charge of carrying a firearm (G.L. c.269, §10[a]). *Commonwealth* v. *Kalhauser*, 52 Mass. App. Ct. 339, 347, further appellate review denied, 435 Mass. 1105 (2001).

EVIDENCE: FINGERPRINTS; SUFFICIENCY OF PROOF OF GUILT

Four men masquerading as trick or treaters made their way into a home, and then held the residents at gunpoint, ransacking the home for money, and eventually obtaining $15,000 from a safe. The Commonwealth presented evidence that police found, inside a traditional Korean cabinet in the basement of the home, two prints identified as having been left by the left middle and left index fingers of the defendant. *Commonwealth* v. *Ye*, 52 Mass. App. Ct. 390, 391-394, further appellate review denied, 435 Mass. 1107 (2001). Though the defendant argued on appeal that the convictions should be vacated because the prosecution had failed to establish that the prints were left on the cabinet during the commission of the crime, the Court distinguished cases cited by the defendant (Morris, 422 Mass. 254 [1996] and Fazzino, 27 Mass. App. Ct. 485 [1989]): here, there was evidence that the prints were "very fresh", and that the defendant had never visited the home prior to the night of the robbery. There was also evidence tying the defendant to an individual who had the motive to rob this particular home. In Commonwealth v. Morris, supra, the defendant's prints had been found on a mask which had been brought to the scene by the criminals, and the evidence implied opportunities for the defendant to have touched the mask other than immediately prior to and during the crime.

EVIDENCE: INFERENCE OF GUILT FROM CLAIM OF RIGHTS TO SILENCE, COUNSEL; NO RELIEF BECAUSE DEFENSE USED AS PART OF "TRIAL STRATEGY"

The defendant, who lived with his estranged wife and child in the home of the wife's parents, fatally stabbed his mother-in-law and fatally hammered the head of his father-in-law before setting fire to the dwelling. Before leaving that scene, he telephoned his attorney in a civil matter in Vermont, saying that he had just beaten his father-in-law with a sledge hammer. The attorney told him to call 911 for assistance at the scene, but not to answer any police questions. The defendant left the scene and headed to the Mansfield train station. In response to a 911 call, apparently from the defendant, police officers from two towns went to the train station, where the defendant hailed them from a car whose door was ajar. He was distraught, covered in blood, and talking into a cell phone saying that he had "screwed up," and "had to do it. They were ruining my life." He was handcuffed and taken to the police station, and was uncooperative during booking, not even giving his name. Eventually, police assisted him in making three telephone calls, including one to the attorney in Vermont. That attorney spoke to police, telling them not to question the defendant. The police told the attorney "that he would have to get that directive [instead] from [the defendant] himself[,]" so the attorney immediately spoke with the defendant on the phone. The defendant then confirmed to police that he would not answer any police questions, including further booking questions. Nonetheless, a state police trooper who arrived an hour or so later repeatedly asked the defendant whether he wanted to speak to him about the incident. The defendant replied repeatedly that he wanted medical attention, mentioning a hit-and-run accident and that his knee hurt. (The hit-and-run incident had occurred in Vermont months earlier, and the Vermont attorney represented the defendant as a plaintiff in that matter.) *Commonwealth* v. *Adams*, 434 Mass. 805 (2001).

On appeal of his first degree murder convictions, the defendant argued that the prosecution improperly introduced his postarrest silence as evidence of sanity, and that similar improper use was made of his request for counsel. *Id.* at 811, 815. There is no question that post-arrest silence and requests for counsel may not be used to permit an inference of guilt; this includes the use of such evidence to infer sanity in cases where criminal responsibility is at issue. *Id.* (citations omitted). There was also no question that the evidence was used here for those prohibited purposes. The SJC refused any relief, however, on the ground that the defense used the evidence "affirmatively at trial ... on both the issue of sanity and the propriety of police conduct toward [the defendant], as part of an apparent trial strategy." *Id.* at 813. That this "trial strategy" may have shown constitutionally ineffective assistance of counsel was not addressed by the Court: "[w]hatever the specific tactical reason for proceeding in this manner and regardless of its net effect, the fact that it was part of an apparent trial strategy weighs heavily in determining the existence of constitutional unfairness and prejudicial effect." *Id.* The opinion claimed that "the evidence of sanity was substantial although inevitably conflicting." *Id.* at 814. This implicit 'finding' was cited in support of the conclusion that the constitutional violations did not create a substantial likelihood of a miscarriage of justice. *Id.* at 815.

The Court's belief in the defendant's guilt doubtless contributed to its holding that there was no error in the admission of "bad acts" and "bad character" evidence concerning the [black] defendant's prior violence toward his wife, his "chasing [of] white women while in college," his Muslim religion, his possession of condoms and lubricant at the time of his arrest, and denigrations of his character (lazy, stupid, flashy, a bad father, and a con man). These were all held to be relevant for one reason or another. *Id.* at 816-822.

EVIDENCE: MEDICAL "REPORT" (G.L. c.233, §79G) EXCLUSION = REVERSAL; STATE POLICE MANUAL INADMISSIBLE (FIELD SOBRIETY TESTS' ADMINISTRATION)

A police officer stopped the defendant for driving erratically at 12:50 a.m. on May 26, 1997. He testified that the defendant's eyes were glassy, red, and bloodshot, that the defendant's breath smelled of alcohol, and that there was a strong smell of alcohol coming from inside the car. He also testified that although the defendant passed the alphabet recitation test, he failed the "one-legged stand" and the "walk and turn" test. The defendant told him that he had had a couple of beers, but also that he had had thirteen ear operations and that his "equilibrium may be off." At the trial for operating under the influence of intoxicating liquor, the defendant himself testified that his hearing, balance, and equilibrium were and are impaired, but that he was not intoxicated on the night in question. Four other witnesses, each of whom had been with the defendant at different times during the evening, testified that in no instance was the defendant intoxicated. The defendant's medical records from a hospital, documenting ear surgeries, and medical records from the Massachusetts Eye and Ear Infirmary, where his treating physician practiced, were admitted in evidence.

Excluded, however, was a report in letter form, signed under the pains and penalties of perjury, by the defendant's physician, Dr. Edward Reardon, addressed "To Whom It May Concern," and dated September 3, 1998. Defense counsel had sent the report to the prosecutor by certified mail ten months before trial began, "and defense counsel provided the clerk's office with an affidavit that enumerated the steps defense counsel had taken to comply with the requirements of G.L. c.233, §79G, including notification to the prosecutor of the report." Nonetheless, upon the prosecutor's objection at trial, the judge excluded it. ONLY in the excluded report was any indication that the defendant had a "balance" problem, though the medical records recited various conditions of the ear and noted hearing loss. The sleazy prosecutor made hay with the exclusion by arguing in closing that "the only evidence we have that the defendant ... had an equilibrium problem is the defendant's own statements. You can look through those medical records and you're not gonna find anything that says the defendant has an equilibrium problem. And you're certainly welcome to look." *Commonwealth* v. *Schutte*, 52 Mass. App. Ct. 796, 800 n. 4 (2001).

The fact that a document may be inadmissible under G.L. c.233, §79, does not mean that it is inadmissible under §79G. *Id.* at 799. Under the latter statute, a written "report" of an examining physician as to a disability or incapacity proximately resulting from a condition that he observed is admissible as an exception to the hearsay rule. The statute is not, contrary to the trial judge, limited to "civil" cases after amendments in 1988. *Id.* at 798. While a "report" under §79G must be by an examining or treating physician, and must be "attested to by the physician," such a report is not inadmissible because prepared in anticipation of litigation. *Id.* at 799. Further requirements for admissibility include that the proponent give written notice to the opposing party, by certified mail, return receipt requested, at least ten days prior to introduction of the report, of the intent to offer the report in evidence, that the proponent file with the court clerk an affidavit of such notice and the return receipt, and that the report itself must be subscribed and sworn to under the penalties of perjury. The defendant's conviction was reversed.

The Court declined to find error, however, in the exclusion of a state police manual relating to standards for administering field sobriety tests. Defense counsel certainly could, and

did, use the manual to impeach the police officer's credibility during cross-examination, "showing deviations between the understanding and practices of the officer and the recommended procedures in the manual [.]" *Id.* at 801.

EVIDENCE: PRIVILEGED RECORDS OF RAPE COMPLAINANT; INEFFECTIVE ASSISTANCE OF COUNSEL IN FOREGOING USE

The defendant was charged with sexual assaults upon a neighbor child over the course of about four years. Prosecution was instituted rather belatedly, and the complainant was fourteen by the time of trial. Though trial defense counsel sought production of the complainant's counseling records prior to trial, and a judge made available to him portions of those records, he did not seek to have them admitted in evidence. The defendant was convicted, and new counsel on appeal made many allegations of ineffective assistance by trial counsel, including one citing the failure to utilize records revealing that at a time the complainant alleged the defendant assaulted her, her own father was being convicted of molesting a friend of her older sister. Appellate counsel argued that use of the records at trial would have raised the possibility that the complainant "had been sexually abused by her father but wanted to protect him. This possibility explains why she sought counseling, and why she insisted that no one reveal that she had named the defendant as the perpetrator." *Commonwealth* v. *Plouffe*, 52 Mass. App. Ct. 543, 545, further appellate review denied, 435 Mass. 1105 (2001).

The Appeals Court responded, first, that this sort of claim should have been made by way of a motion for new trial, in the trial court, with the potential for evidentiary hearing and findings about why counsel chose to forego such use of the records. The Appeals Court, "on the record before [it]," did not find the failure to introduce the records to be manifestly unreasonable, "the standard by which we review a challenge to a tactical decision of counsel." *Id.* at 546.

EVIDENCE: REFRESHING RECOLLECTION OUTSIDE JURY'S PRESENCE; CHILD WITNESS

A child sexual assault complainant had difficulty answering questions during direct examination. The trial judge ordered a recess and permitted the prosecutor to "refresh this witness's recollection with prior statements" before they returned to the courtroom. Before the witness resumed her testimony, the judge told the jurors that witnesses' recollections are usually "refreshed" by permitting them to read to themselves while on the stand prior statements they have made, but that because this witness could not yet read, the prosecutor had "go[ne] through a similar process" outside the jury's presence. Although the defendant did not object, "it was error to allow the prosecutor to refresh the complainant's recollection outside the jury's presence." *Commonwealth* v. *Quincy Q., a juvenile*, 434 Mass. 859, 871 (2001). "The possibility that the prosecutor, inadvertently or not, suggested to the child the desired substance of her testimony during the break and that the complainant tried to accommodate the prosecutor when she returned to the stand is too great for us to sanction such a process." *Id.*

EVIDENCE: RELEVANCE (BAD ACTS)

At the defendant's trial for trafficking in cocaine, the prosecutor cross-examined the defendant about certain documents seized during execution of the search warrant at his house. The prosecutor showed the defendant these documents (two blank social security cards, a blank New York state driver's license, a New Jersey operator's license, and a blank New York birth certificate, some of the documents having "raised seals"), and asked him to explain their

presence in his house. Notwithstanding the Commonwealth's claim that the evidence was admissible to impeach the defendant's testimony that he did not conduct drug sales from his apartment, "the evidence lacked any 'rational link' to the charges" and "did not tend to disprove anything that the defendant had testified to on direct examination." It was merely evidence of extraneous bad acts or criminal conduct, and was erroneously admitted. *Commonwealth* v. *Siano*, 52 Mass. App. Ct. 912, 913-914, further appellate review denied, 435 Mass. 1108 (2001). The Appeals Court termed the error harmless on the evidence presented, "proof of the defendant's guilt [being] strong[,]" in the opinion of the Court. *Id.* at 914.

See also *Commonwealth* v. *Stewart*, 52 Mass. App. Ct. 755 (2001), summarized at ***CRIMES: ABUSE PREVENTION ORDER, VIOLATION OF; PRESENCE INCIDENTAL TO RETURN OF MINOR CHILD***.

EVIDENCE: RELEVANCE (SUBSEQUENT BAD ACTS)

The Commonwealth contended that the defendant had sexually assaulted the daughter of his girlfriend when the daughter was thirteen. The defendant (with his girlfriend and her other two children) fled the Commonwealth after charges were brought, and the complainant lived in foster homes and later with her maternal grandmother. She was told by her grandmother that the police had dropped the case. Later, she married and had two children of her own. She visited her mother and siblings on occasion, "tolerating the defendant's presence in order to see them." At some point, she accepted her mother's offer of an apartment for her family in the multi-family home that her mother and the defendant had bought in Connecticut. Within two years after her family's move to this residence, she claimed that the defendant pushed his way into her apartment when she was home alone, and told her that he was still in love with her, that he had been so since the first time he saw her, and that he did not want her mother. He allegedly touched her breasts and tried to touch her genitals, and she reported the incident to the local police, who took him into custody. Sometime thereafter, the complainant sought to learn what had happened to the Massachusetts prosecution aborted seven or eight years earlier. It was revived, and led to the defendant's conviction on a charge of indecent assault and battery. At the trial, evidence of the alleged sexual assault in Connecticut was admitted over defense objection. *Commonwealth* v. *Santiago*, 52 Mass. App. Ct. 667, **further appellate review allowed, 435 Mass. 1105** (2001).

The Appeals Court held that at retrial, necessitated by unrelated error, "admission of the evidence would not be error" if the trial judge exercised discretion to so admit and gave careful limiting instructions. The Connecticut incident was relevant "in its verbal aspect to show acknowledged and continuing sexual passion" and also served to explain why the long-delayed prosecution in Massachusetts came to be pursued. *Id.* at 680.

EVIDENCE: RELEVANCE (BAD ACTS OF PERSON ALLEGED BY DEFENSE TO BE THE KILLER)

The defendant was charged with, and convicted of, aggravated rape and first degree murder of a young woman in a neighboring apartment. One prosecution witness at trial was the victim's boyfriend. The defendant sought to suggest that the boyfriend was the killer. Toward that end, the defense tried to introduce evidence that, four years before the murder, the boyfriend had twice criminally assaulted a man named Mannix, purportedly because the boyfriend was jealous of Mannix's relationship with the victim, and that the boyfriend's mother had provided a false alibi to defend against criminal charges connected to one of the assaults. Upon the

Commonwealth's motion in limine to exclude this evidence, Mannix was questioned at a voir dire, and the trial judge thereafter disallowed inquiry of the boyfriend about the Mannix assault or the allegedly false alibi. The SJC affirmed this ruling. While a defendant has a right to show that someone other than the defendant committed the crime or had motive to commit the crime, this evidence involved extremely collateral issues and was too remote in time. It was particularly noted that the excluded evidence did not indicate that the boyfriend had directed any violence or threats toward the victim. *Commonwealth* v. *Miller*, 435 Mass. 274, 279 (2001).

EVIDENCE, RELEVANCE: BAD ACTS; "OPENED DOOR"?

The prosecution contended that the defendant trafficked in cocaine and possessed marijuana with intent to distribute. He had thrown onto the roof of a building, during a foot chase by police, a plastic bag containing over 200 grams of cocaine, and had in his pocket four baggies of marijuana. The defendant testified at trial after being assured that the prosecution would not seek to introduce any prior convictions to impeach his credibility. *Commonwealth* v. *Wilson*, 52 Mass. App. Ct. 411, 415-516 n. 4, further appellate review denied, 435 Mass. 1108 (2001). The defense was that he possessed the marijuana for personal use, and that someone had slipped the cocaine into his pocket, so that he had not knowingly possessed it. *Id.* at 419. During direct examination, the defendant was asked why he had fled from the police, and he responded that he had been frightened because there was an outstanding arrest warrant for him resulting from his failure to complete a drug program. *Id.* at 416. It was error for the prosecutor thereafter to ask some sixteen questions about whether there "could have been" more than one outstanding warrant, or as many as "seven," whether there was some "probation situation," whether there had been "motor vehicle citations," whether "other cases ""involve[d] narcotics," etc.

Defense counsel's objection came exceedingly late, i.e., after the sixteen questions. The judge at side bar then told the prosecutor to go to a different area, because "the probative value is outweighed by the prejudice." *Id.* at 416-417 and n. 5. The Appeals Court invoked the standard of "substantial risk of a miscarriage of justice," and thereafter noted that it was "persuaded that the verdict would have been the same without the erroneously admitted evidence." *Id*. at 418.

EVIDENCE, HEARSAY: ADOPTIVE ADMISSIONS BY SILENCE

An attorney and his "assistant and driver" were convicted of bribery (G.L. c.268A, §2(c)) and interference with a witness (G.L. c.268, §13B). The Commonwealth's case was that the defendants would offer and pay money to prosecution witnesses in exchange for the witnesses' not showing up to testify in cases in which the attorney represented criminal defendants. The attorney had testified before the grand jury and argued on appeal that admission of a portion of this testimony at his trial was error. In the testimony at issue, the attorney indicated that he knew that a prosecution witness was wearing a "wire" during meetings with him, and he chose not to speak with her. The Commonwealth claimed, apparently, that the failure to speak was an adoptive admission by silence, i.e., an agreement with what seems to have been the witness's conversational premise of payment for lack of prosecution. The attorney-defendant argued that the Commonwealth was seeking, simply from silence, an improper inference of guilt and reluctance to make what he knew would be incriminating statements to a "wired" individual. The Appeals Court agreed with the defendant and believed that caselaw expresses "a 'general wariness' of admissions by silence." *Commonwealth* v. *Boyer*, 52 Mass. App. Ct. 590, 599, further appellate review denied sub nom. Commonwealth v. Cumba, 435 Mass. 1106 (2001).

"Simply stated, there was nothing said by [the witness] to [the attorney] that [the attorney] reasonably could have been expected to deny or rebut. [The witness] attempted merely to engage [the attorney] in conversation. [The attorney] declined, as any reasonable person might do for any number of reasons. Nor, under these circumstances, does [the attorney's] awareness that [the witness] was wearing a wire change the analysis." *Id.* The Court granted no relief, however, believing there to have been no prejudice from the error given the strength of the prosecution's case.

EVIDENCE, HEARSAY: BASIS FOR POLICE ACTION

See *Commonwealth* v. *Spencer*, 53 Mass. App. Ct. 45, further appellate review denied, 435 Mass. 1107 (2001), summarized at ***COMPLAINTS AND INDICTMENTS: EVIDENCE TO GRAND JURY OF TWO DRUG SALES, BUT ONLY ONE ACT CHARGED.***

EVIDENCE, HEARSAY: EXCITED UTTERANCE ERROR

The Commonwealth's evidence was that the defendant lived with his girlfriend and her three children, and that at 2 a.m. one morning he came into the bed of his girlfriend's thirteen year old daughter, where he threatened to kill her if she screamed, and proceeded to touch her breasts and insert his penis into her vagina, though it "didn't go all the way in." At school that day, she told her guidance counselor, in Spanish, these allegations. The guidance counselor called the complainant's mother and the police. Both the mother and the police arrived at school, where the complainant recounted to them the story, the counselor acting as translator for the police. The counselor also accompanied the complainant and her mother to the hospital thereafter. While the complainant was being examined at the hospital, the defendant came to the hospital. A police officer approached the defendant, and via the Spanish-speaking guidance counselor, sought to question the defendant, who was given Miranda rights in Spanish. *Commonwealth* v. *Santiago*, 52 Mass. App. Ct. 667, **further appellate review allowed, 435 Mass. 1105** (2001).

The defendant told the officer that the complainant had a crush on him and asked him to come to her bedroom that night, and that although he had gone to the bedroom doorway, he had not gone in. The defendant was arrested, handcuffed, and led away. The complainant's mother at this point ran over to the officer and yelled out in Spanish (translated by the guidance counselor) that the defendant had told her that he "went into [the] bedroom and kissed her, but ... only put his finger into her vagina, but did not have intercourse [with the complainant]." After painstaking analysis, the Appeals Court concluded that the statement by the complainant's mother was erroneously admitted as an "excited utterance." The Court first rejected the Commonwealth's claim that the statement was not hearsay because it wasn't "admitted for the truth" and showed "only the defendant's consciousness of guilt. Not only was no limiting instruction to this effect given, the statement was certainly "introduced to prove as true that the defendant had in fact told the complainant's mother something about what he had done, even if not to show that what he told her was itself true." *Id.* at 670-671. Furthermore, "the statement itself is inherently quite toxic, and is not one the jury would likely forget." *Id.* at 678.

The prerequisites for admissibility of "excited utterance" hearsay are (1) exciting event, (2) declarant displaying a sufficient degree of excitement, (3) the statement made tends to characterize or explain the underlyling event, and (4) declarant not "capable of 'reflecting sufficiently on the incident to contrive a false story.'" *Id.* at 672 (citations omitted). With some skepticism, the Court was willing to assume that the first two factors had been satisfied. (The

skepticism conveyed that the exciting event logically would have been the alleged assault, NOT the defendant's arrest for same. The latter event, however, was required to be used in the analysis so as to be close enough in time to the utterance. Furthermore, given the sequence of events and the significant passage of time after the mother became aware of the allegations, the arrest "should not have been ... a surprise," even though it may have been "unwelcome to [her]" and "may well have seemed unwarranted to her.") The Court was even more discomfited by the third criterion: while the purportedly spontaneous/excited utterance is supposed to relate in direct fashion to the exciting event that precipitated it, the statement here "appears primarily to concern not the arrest but an event prior to the arrest, i.e., the sexual assault of the night before." *Id.* at 673. The Court nonetheless soldiered on, believing that (the ill-reasoned) Commonwealth v. Zagranski, 408 Mass. 278, 286 (1990), provided support for finding satisfaction of the third requirement. At the fourth prerequisite, the Court drew the line, finding that the declarant in the circumstances had been "capable of 'reflecting sufficiently on the incident to contrive a false story.'" *Id.* at 674. "While it is of course possible that the mother may simply have truthfully blurted out what her boyfriend earlier had told her, it is just as conceivable that the mother constructed a premeditated explanation to use as and when she thought best. Otherwise put, she may never in fact have had any such conversation with the defendant." *Id.* at 675-676.

EVIDENCE, HEARSAY: 209-A DOCUMENTS; PRIOR CONSISTENT STATEMENTS; "OFFICIAL RECORD"

A woman repeatedly paged the man who was the father of her soon-to-be-born child. He appeared only two days later, and an argument ensued when he said that he would provide no support for her or the child. The woman claimed that he became angry when she refused to permit him to take a shower: he allegedly pulled her hair, threw her on the bed, straddled her and slapped her face, "tried to sleep with" her by lifting her shirt and "sucking on her chest," and went to take a shower when she declined to "sleep with" him. While he was in the shower, the woman slipped out of the apartment and told a neighbor to call the police. When the police arrived, the woman told them that her boyfriend had beaten her up and that she wanted him out of the house. The police interrupted the man's shower and escorted him downstairs, arresting him subsequently for assault and battery (the charge on which he was later convicted). Two days later, the woman applied for and obtained an abuse prevention order pursuant to G.L. c.209A. The affidavit signed by the woman at the time recounted many of the same allegations, but omitted the "trying to sleep with" factor and other details. The ensuing court order decreed that there was a substantial likelihood of immediate danger of abuse and that the defendant was to immediately surrender to police all guns and ammunition, to stay at least fifty yards away from the plaintiff, and to not abuse the plaintiff by threats or physical harm, or make the plaintiff engage in sexual relations unwillingly by force, threat, or duress. *Commonwealth* v. *Foreman*, 52 Mass. App. Ct. 510, 512 (2001).

At trial, the same neighbor who had called the police at the woman's behest testified that the woman had told her earlier on the day of the incident that she wanted the defendant to go to jail because he wasn't going to take care of her baby, and complained as well about the defendant living with another woman. The Commonwealth introduced at trial the "209A documents," i.e., the complaint for protection, the abuse prevention order, and the woman's affidavit filed in support of the complaint. Although defense counsel had failed to object to this evidence, the Appeals Court reversed the defendant's conviction, finding a substantial risk of a miscarriage of justice. The documents were NOT admissible as "an official record," *id.* at 514, nor were they

admissible as a "prior consistent statement." "To be admissible [as prior consistent statements], such statements must have been made before any motive to contrive existed in order to belie a charge of recent fabrication." *Id.* at 513. Here, "the defendant's rejection of [the complainant] predated all of [her] differing descriptions of the assault and battery at trial, including those contained in the 209A documents." *Id.* The probable prejudice to the defendant was pronounced: the "judicial imprimatur" on the 209A order would likely have signified to a jury "that a judge had already reviewed the facts and decided the credibility dispute that the jury were being asked to consider." *Id.* at 515.

IDENTIFICATION, SUPPRESSION OF: BURDEN ON DEFENDANT; IDENTIFYING WITNESSES TOGETHER AT TIME OF I.D. PROCEDURE

Three men appeared when a restaurant owner was getting into his car with the night's receipts; one held an Uzi to the owner's head. He turned over the money and other valuable personal items. Someone in a nearby office saw it all happening and caused immediate report to the police. The first officer arrived in time to see three men running toward a white car, but his appearance caused them to scatter, on foot. Two men were found hiding in bushes a short distance from the crime scene. They were handcuffed and brought to the scene in a cruser. At the scene, the defendant was taken out of the cruiser and displayed in a well-lighted parking lot. The victim and the witness were together, inside the office from which the witness had observed the robbery. Each identified the defendant as one of the assailants. After this display, the other male was similarly displayed, with identical result. The identifications occurred within ninety minutes of the robbery. *Commonwealth* v. *Wen Chao Ye*, 52 Mass. App. Ct. 850, 852-853, 855 (2001).

The Appeals Court held that the defendant had failed to meet his burden of showing, by a preponderance of the evidence, that the show-up procedure was "so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny the defendant the due process of law." *Id.* at 854. Along the way, the opinion stated, twice, no doubt in response to criticism of the joint viewing of the suspects by the two witnesses, that a police officer was present "to ensure that one did not influence the other." *Id.* at 852-853, 855. It is entirely unclear how the mere presence of a police officer is supposed to "ensure" this. Proceeds of the robbery were found, allegedly, on each defendant's person at booking. ***Practice tip.*** Another issue argued by the defendant on appeal was the judge's failure to instruct, as requested, that jurors could "take into account that any identification that was made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to a witness." While the Court opined that "the preferable course of action would have been to give the requested instruction," *id.* at 856, defense counsel failed to object to the omission at the end of the charge, and was thus charged with failing to preserve the point: no substantial risk of a miscarriage of justice was found. The opinion set forth the jury charge on identification given in this case. *Id.* at 856-857. It appears that the reason for such inclusion must have been to indicate to any reader the necessity of LISTENING TO THE JURY CHARGE AND MAKING FOCUSED OBJECTIONS. The language of this instruction is, in parts, nonsensical gibberish which could not have been understood by any human being charged with listening to it.

IDENTIFICATION: WITNESS'S DEGREE OF CONFIDENCE IN ACCURACY OF I.D.

In Commonwealth v. Santoli, 424 Mass. 837, 845-846 (1997), the SJC directed that juries should no longer be instructed regarding "the significance, if any, of a witness's confidence in an

identification." This occurred because studies have shown that there is no correlation between a witness's "certainty" and the accuracy of his identification. In *Commonwealth* v. *Cowans*, 52 Mass. App. Ct. 811, 813-814 (2001), the defendant argued, on the basis of Santoli, that it was error to allow a shooting victim to testify on direct examination, over defense objection, that he had no doubt that the defendant was the person who shot him. The Appeals Court said that it was declining to "extend Santoli to prohibit inquiry ... about a witness's level of confidence in an identification." *Id.* at 814. The opinion faulted the defendant for "overlook[ing] the basic rule that relevant evidence is admissible." *Id.* The opinion thus strikingly failed to understand the reason for Santoli's ruling: a witness's affirmative certainty as to a correct identification is NOT RELEVANT to its correctness. Santoli recognized that "there is significant doubt about whether there is any correlation between a witness's [affirmative] confidence in her identification and the accuracy of her recollection. " 424 Mass. at 845-846. An accompanying observation in Santoli further effectively answers the *Cowans* assertion that "the rule advocated by the defendant would preclude expressions of *uncertainty* as well." 52 Mass. App. Ct. at 814, i.e., "[i]t is probably true that **the challenged instruction has merit in so far as it deals with the testimony of a witness who expressed doubt about the accuracy of her identification** [.]" 424 Mass. at 845-846.

JOINT VENTURE: INTENT NEEDN'T BE IDENTICAL TO THAT OF PRINCIPAL

Two defendants were found by a jury to be delinquent by reason of second degree murder. The evidence was that the two were part of a group of nine high school students which taunted, chased, and battered various other youths, first in Abington and later in Whitman, before arriving in Rockland. In a parking lot there, one defendant began to taunt the victim, who hit the defendant in the upper body. The victim obtained a baseball bat from his van and swung it in front of him "as if to fend ... off" his attackers. One defendant slammed the victim to the ground by using the van door. One James retrieved the bat; the two defendants and others were beating the victim while James struck the first two of three blows with the bat. All the assailants fled the scene in their vehicles. The victim suffered injuries to his hands, knees, hip, elbow, forearm, eyes, forehead, and nose, and had three distinct areas of bruises on his head. "[H]is skull was massively fractured." One defendant acknowledged pushing the van door into the victim, and then kicking him in the head. The other defendant stated to someone after the event that he had "felt his hand go through the man's skull."

The man who wielded the bat was convicted in a separate trial of murder in the first degree under the theory of extreme atrocity or cruelty. On appeal of their finding of delinquency, these two defendants argued that the Commonwealth had "conceded that the defendants did not act with specific intent to kill," that they thus could not have "shared the same mental state as" the principal, and that therefore their convictions under the theory of joint venture were violative of due process. The Appeals Court called the contentions "incorrect" and "mistaken." It is not necessary that joint venturers share the same intent to be convicted for their participation. The Court approved the instructions given on the facts here, i.e., that the Commonwealth had to prove beyond a reasonable doubt that the defendants were present at the scene of the crime and aided in its commission while "sharing the intent required to commit the crime." *Commonwealth* v. *DiRenzo*, 52 Mass. App. Ct. 907, 908, further appellate review denied, 435 Mass. 1104 (2001). The decision asserted that the necessary intent had to be only the mental state required for the crime of which any single defendant was convicted. *Id*. That this construction fails to enforce a "shared" intent was ignored by the Court, which cited Commonwealth v. Cunningham, 405 Mass. 646, 659 (1989) in support of its view.

JOINT VENTURE: SUFFICIENCY OF EVIDENCE; FINGERPRINT; SHARED INTENT

The Commonwealth's evidence would support a finding that three Asian males accosted a Lexington restaurant owner after he had gotten into his car at about 10:30 p.m. with the night's receipts, that he surrendered same after having an Uzi machine gun put to his head, that the three robbers fled toward and got into a white car, and that four men fled from the car when a police cruiser immediately appeared to apprehend the robbers. There was some evidence that the driver's side rear door of the car, unlike the other doors, was pushed shut by one of the fleeing foursome. About eight hours after the robbery, i.e. at 6:45 a.m., an officer came upon an Asian male on the porch of an office building about three or four blocks from the robbery scene, though the man was "ducking down behind some shrubs." Upon questioning, the man (shivering throughout the interview) said that he was supposed to meet a friend coming from Charlestown at 6:30 a.m., and that he had taken a bus to Lexington from the Alewife MBTA station that morning. When questioning did not stop, the man eventually said that he did not understand the officer, "despite showing no signs of communication problems until that point." Though the man was not then arrested, he was eventually charged with the robbery: a fingerprint found on the outside of the white car's window behind the driver's side door was identified as matching this man's left index finger. *Commonwealth* v. *Hoa Sang Duong*, 52 Mass. App. Ct. 861, 864-865, further appellate review denied, 435 Mass. 1108 (2001).

The Appeals Court held that the jury could have inferred, beyond a reasonable doubt, that the man left his fingerprint on the door when fleeing the scene after the robbery, and thus that he was "present," an element of joint venture guilt in the circumstances. *Id.* at 866. The Court further found there to have been sufficient evidence to prove beyond a reasonable doubt the required element of the defendant's "agreement to be willing and available to help the accomplice(s) if necessary," although this was, at least, acknowledged to be "a close question." *Id.* at 868.

JURY IMPANELMENT: PEREMPTORY CHALLENGE OF SOLE MALE

At the District Court jury trial of a man charged with operating under the influence of liquor, six women and one man were seated in the box, and the prosecutor exercised a peremptory challenge of the man. Defense counsel objected, and asked that the prosecutor be required to state a reason. The judge said that he was not going to inquire, because he did not believe that "gender" was a "protected class." The prosecutor nonetheless "offered reasons other than gender for challenging the juror including the juror['s] background in science." The judge made no ruling about these reasons, but merely observed that the prosecutor had offered them.

The judge erred in every procedural way: gender IS a "protected class" in this context, and the judge should have made a finding as to whether the prosecutor's challenge of the single juror made out a prima facie showing of impropriety. If the judge found that it did, he should then have required the prosecutor to state reasons unrelated to gender, and should have determined whether these reasons were the real ones or sham ones. But "the judge's failure to follow these specified procedures before allowing the Commonwealth's peremptory challenge in this case does not constitute a per se basis for reversal." *Commonwealth* v. *Dolliver*, 52 Mass. App. Ct. 278, 281 (2001). The Appeals Court made its own determination that the challenge was gender-neutral, and gave no relief.

JURY INSTRUCTIONS: ESSENTIAL ELEMENT OF CRIME REMOVED = REVERSAL

HERE (DESPITE NO OBJECTION)

See *Commonwealth* v. *Cowans*, 52 Mass. App. Ct. 811, 820-821 (2001), summarized at ***CRIMES: ARMED HOME INVASION (G.L. c.265, §18C), REQUIREMENT OF INTENT TO CAUSE FEAR***. See also *Commonwealth* v. *Redmond*, 53 Mass. App. Ct. 1, 5-8, further appellate review denied, 435 Mass. 1107 (2001), summarized at ***CRIMES: BURGLARIOUS IMPLEMENT POSSESSION; STANDARD INSTRUCTION HELD ERRONEOUS***.

JURY INSTRUCTIONS: 'FAILURE TO TEST' / INADEQUACY OF PROSECUTION'S PROCEDURES; REFUSAL TO REQUIRE INSTRUCTION re: BREATHALYZER'S POSSIBLE INACCURACY

The defendant was convicted by a District Court jury of operating under the influence of liquor. The prosecution's evidence included testimony that he had registered, twice, a blood alcohol level of .09 per cent, above the level of .08 at which a permissible inference may be drawn that the person tested is under the influence of alcohol. G. L. c.90, §24(1)(e). The pertinent witness also testified that he had ensured that the breathalyzer machine had been properly certified annually, and that it had been "calibrated" monthly as required by law. The judge instructed the jury that a reading of .08 percent or more gave rise to a permissible inference that the defendant was under the influence of intoxicating liquor. On appeal, the defendant argued that the judge was required to give, as well, the requested instruction set forth in Model Jury Instructions for Use in the District Court § 5.10, at 4 (1995). That instruction is, "If you believe that the test may have been inaccurate (because it was scientifically invalid) (or) (because it was not properly and competently administered) then you should disregard the test results altogether and determine whether the defendant is guilty or not guilty based on the other evidence presented in this case." *Commonwealth* v. *Dolliver*, 52 Mass. App. Ct. 278, 284 (2001).

The Appeals Court held that the instruction was not required because, contrary to the defendant's claim, the defense had not "effectively challenged the accuracy of the breathalyzer machine." The fact that a simulator test performed at the time of testing produced a reading of .14 rather than what it should have produced, i.e., a .15, was deemed an inadequate challenge for this purpose, because "such a reading is within the zone of tolerance." *Id.*

JURY INSTRUCTIONS: IDENTIFICATION; FACTOR OF IDENTIFICATION FROM GROUP RATHER THAN ONE-ON-ONE

See *Commonwealth* v. *Wen Chao Ye*, 52 Mass. App. Ct. 850, 856 (2001), summarized in pertinent part in Practice Tip accompanying summary at ***IDENTIFICATION, SUPPRESSION OF: BURDEN ON DEFENDANT; IDENTIFYING WITNESSES TOGETHER AT TIME OF I.D. PROCEDURE***.

JURY INSTRUCTIONS: JOINT VENTURER'S KNOWLEDGE OF PRINCIPAL'S POSSESSION OF DANGEROUS WEAPON

See *Commonwealth* v. *Colon*, 52 Mass. App. Ct. 725, 729-731 (2001), summarized at ***CRIMES: ARMED ROBBERY, SUFFICIENCY OF PROOF OF WEAPON; JOINT VENTURER'S KNOWLEDGE OF WEAPON***.

JURY INSTRUCTIONS: LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER UNWARRANTED

The defendant's statement to the police was that his girlfriend had very belatedly told him that she had AIDS and herpes, and that he therefore probably had contracted these viruses as well. She allegedly yelled at him, slapped him in the face, and pulled at his sweatshirt, but he proceeded to leave her residence. He could not find his car keys, however, either inside the house or outside with the car. The girlfriend had followed him downstairs and outside, and was carrying some sort of "tool" or "chisel," which she placed on the roof of her own car as she leaned inside it looking for the defendant's keys. She was yelling that the defendant was "using her," and that "all men are the same." The defendant then picked up the tool and struck her, and after she fell to the ground he continued to strike her head and face. Wanting her moaning "to stop," the defendant threw a concrete block upon her. Subsequently he moved his car on top of her body. *Commonwealth* v. *Groome*, 435 Mass. 201, 209-210 (2001).

On appeal of his first degree murder conviction, the defendant argued that the judge erred in refusing to instruct the jury on the lesser offense of voluntary manslaughter, on the basis that the revelation about AIDS and herpes was such provocation as to cause him to lose his self-control in the heat of passion. But a voluntary manslaughter, "heat of blood" killing, occurs before sufficient time has elapsed for the accused's temper to cool. That did not happen here, said the SJC, because on the defendant's own description of events, he had "cooled off" sufficiently to look for his keys in preparation to leave, and continued his efforts to leave after the victim followed him downstairs. The victim's "yelling" at the time he struck her had not to do with AIDS and herpes, and was instead about his purportedly "using her." *Id.* at 221. The Court further claimed, albeit unpersuasively, that the voluntary manslaughter theory pressed on appeal was somehow at odds with the expert testimony presented by the defense at trial concerning "intermittent explosive disorder." *Id.* at 222-223 and n. 28.

The Court also rejected arguments for a voluntary manslaughter instruction in *Commonwealth* v. *Contos*, 435 Mass. 19, 22-23 (2001), summarized at ***DISCOVERY, RECIPROCAL: PSYCHIATRIC EXAM OF DEFENDANT BY COMMONWEALTH EXPERT.***

JURY INSTRUCTIONS: MISSING WITNESS

See *Commonwealth* v. *Spencer*, 53 Mass. App. Ct. 45, further appellate review denied, 435 Mass. 1107 (2001), summarized at ***COMPLAINTS AND INDICTMENTS: EVIDENCE TO GRAND JURY OF TWO DRUG SALES, BUT ONLY ONE ACT CHARGED.***

JURY INSTRUCTIONS: MURDER, DELIBERATE PREMEDITATION; REVERSIBLE ERROR IN INCLUSION OF SECOND AND (ERRONEOUS) THIRD PRONG MALICE DEFINITIONS

The prosecution's evidence was that the defendant reacted belligerently when the owner of a Chinese food restaurant refused to serve his group sometime after midnight one night. An exiting group of patrons saw the dispute, and one of those persons sought to quell the disturbance by identifying himself as a police officer and displaying his badge. The defendant allegedly said, repeatedly, "you ain't no f ----- police officer," and further argument ensued. The off-duty officer told the defendant's group to "take him out of here," and they did so. Minutes later, though, as the officer's group was leaving the restaurant, the defendant and his friends were standing a short distance away, and the defendant again yelled something about "f---- cops." Though the officer's group had walked away, they heard running footsteps and turned to see the defendant about five

feet away, raising a handgun. He shot each of three persons with one shot, after uttering a one-sentence taunt to each, individually ("You want one of these too?", "you ain't no f--- cop," and "are you a f--- cop too?"). The weapon used was a revolver which required manually pulling the trigger or cocking the hammer to fire each shot. After firing the three shots, the defendant ran back down the street, jumped in his group's car, and with them fled the scene. Two of the victims recovered from their wounds; one, who had been shot either second or third in sequence, died. The defendant had consumed a large quantity of alcohol during the eight or more hours prior to the shootings, and was, literally, "falling down" drunk about fifteen minutes before going to the Chinese restaurant. *Commonwealth* v. *Johnson*, 435 Mass. 113 (2001).

The defendant was convicted of first degree murder after a trial which presented two defenses: he was misidentified as the shooter in the group (the defense insisted upon by the defendant), and he was sufficiently mentally impaired that he had not deliberately premeditated murder (grudgingly agreed to by the defendant, and to be presented, if at all, only after the Commonwealth rested and the defense could evaluate the strength of the prosecution's case on identification). The SJC found the identification evidence strong, and held that there was sufficient evidence to support, beyond a reasonable doubt, deliberate premeditation. Notwithstanding the sufficiency of the evidence on the latter point, however, the murder conviction was reversed because the trial judge erred in "interming[ing] within his definition of deliberate premeditation the ... second and third prongs of malice, thus expressly permitting the jury to convict the defendant of murder on the theory of deliberate premeditation if they concluded that the defendant intended 'to do grievous bodily harm,' intent which would be sufficient for murder in the second degree, or 'to do an act creating a plain and strong likelihood that death or grievous bodily harm would follow,' an erroneous definition of the third prong of malice that is simiilar to the proof required for involuntary manslaughter." *Id.* at 121. ***Practice tip.*** The trial attorney had submitted a request for instruction on first degree murder, deliberate premeditation, which included only the first prong of malice. The judge stated unequivocally that he would not give the instruction. He thereafter proceeded to give the erroneous charge. The SJC deemed the issue unpreserved because trial counsel failed to object to the instruction given. *Id.* at 120 and n. 8. While here the Court concluded that the error created a substantial likelihood of a miscarriage of justice, such a conclusion would not occur upon other evidence. **YOU MUST OBJECT TO JURY INSTRUCTIONS WHICH ARE GIVEN. THIS IS THE SAFER COURSE, EVEN IF YOU THINK THE ISSUE SHOULD BE PRESERVED BY THE JUDGE'S UNEQUIVOCAL REJECTION OF YOUR CORRECTLY SUBMITTED AND LEGALLY ACCURATE REQUESTED INSTRUCTIONS.**

JURY INSTRUCTIONS: PREMATURE, SUA SPONTE, "TUEY-RODRIQUEZ" CHARGE AFTER TWO HOURS OF DELIBERATIONS

The charge was operating under the influence. The prosecution presented the testimony of the arresting officer; the defendant testified, called four supporting witnesses, and introduced documentary medical evidence concerning ear surgeries. The judge sent the jury out to deliberate at 4:50 p.m. (!), but was apparently annoyed at their failure to return a verdict within two hours. At 6:50 p.m., he called the jury into the courtroom, sua sponte, and instructed them in accord with the "deadlock suggestions" charge in Commonwealth v. Rodriquez, 364 Mass. 87, 101-102 (1973). According to the Appeals Court, defense counsel failed to object to this process. Having reversed the defendant's conviction on an unrelated ground, the Appeals Court managed to say about this only that the risk of coercing a verdict "is most prevalent where a

judge [AS HERE] recalls the jury on his or her own initiative in order to prompt the jury to reach a decision," and that "[t]he practice is disfavored." This jury came back with a question after the [unwarranted] charge, and the Court cited this fact as indicating that the instruction did not have a coercive effect. *Commonwealth* v. *Schutte*, 52 Mass. App. Ct. 796, 802 (2001).

JURY INSTRUCTIONS: REASONABLE DOUBT; SLIP OF TONGUE IN SUPPLEMENTAL CHARGE YIELDS NO RELIEF

In what might be seen as a boost to the prosecution in any case, a judge augmented the "Webster" reasonable doubt charge when the jury requested further instruction on the point by assuring them that the Commonwealth was not required to prove the case "to an absolute or mathematical certainty." This language was upheld in Commonwealth v. Mack, 423 Mass. 288, 290 & n.5 (1996). This judge, however, "slipped," and said that the Commonwealth was not required to prove its case "to an absolute or a *moral* certainty. The "slip of the tongue" did not nulllify the Webster instruction on reasonable doubt, which had been given both in the initial instructions and in the supplemental instruction, before the instruction which contradicted it. "The phraseology and the grade school mathematical example in *Mack* ['mathematical certainty is that level of certainty that you willl have if you add two and two and arrive at four'] make plain that absolute or mathematical certainty is the focus, and that absolute or mathematical certainty is not required for proof beyond a reasonable doubt." *Commonwealth* v. *Redmond*, 53 Mass. App. Ct. 1, 9, further appellate review denied, 435 Mass. 1107 (2001).

JURY INSTRUCTIONS: REVERSAL FOR NEGATION OF VIABLE DEFENSE UNDER COMMONWEALTH V. BOWDEN

See *Commonwealth* v. *Paul*, reported sub nom. *Commonwealth* v. *Remedor*, 52 Mass. App. Ct. 694, further appellate review denied, 435 Mass. 1107 (2001), and summarized herein at ***DEFENSES: ENTRAPMENT; "BOWDEN" / INADEQUACY OF POLICE INVESTIGATION; JURY INSTRUCTIONS NEGATING***.

JUVENILES: YOUTHFUL OFFENDER; THREAT/ INFLICTION OF SERIOUS BODILY HARM MUST BE PROVEN BY COMMONWEALTH BEYOND REASONABLE DOUBT

The "youthful offender" statute, G.L. c.119, §54, permits prosecutors to proceed by indictment if the following statutory requirements are present: (1) the alleged offense was committed while the individual was between the ages of fourteen and seventeen years; (2) if he were an adult, the offense would be punishable by imprisonment in the State prison (i.e., a felony); and (3) the individual was previously committed to the department of youth services, OR the alleged offense involved certain enumerated firearms violations, OR it involved "the infliction or threat of serious bodily harm." The label "youthful offender" "refers not to a status necessary before an indictment may be brought by a prosecutor, but to a status that is an outcome of indictment and adjudication." While there is no requirement that the infliction or threat of serious bodily harm be an element of the crime itself, a prosecutor seeking a youthful offender adjudication on the "infliction or threat of serious bodily harm" component of the statute must prove that the conduct at issue involved such infliction or threat of serious bodily harm. *Commonwealth* v. *Quincy Q., a juvenile*, 434 Mass. 859, 862-863 (2001) (citation omitted).

Quincy Q. was indicted as a youthful offender on two charges of forcible rape of a child under the age of sixteen and two charges of indecent assault and battery of a child under the age of fourteen. Though the defendant moved to dismiss the charges on several grounds, the motions

were denied. At trial, the presiding judge allowed the defendant's motion for required finding only as to the "force" element of the rape charges; thereafter, the jury acquitted the defendant on both rape charges and on one indecent assault and battery charge. He was, however, "adjudicated a youthful offender by reason of the remaining charge of indecent assault and battery." Because the prosecution failed to present to the grand jury any evidence of "the infliction or threat of serious bodily harm" and this was required in order to obtain a "youthful offender indictment" charging the indecent assault and battery on a child under the age of fourteen, the motion to dismiss the youthful offender indictment alleging indecent assault and battery should have been allowed. The case was remanded for possible trial on a delinquency complaint for indecent assault and battery. *Id.* at 861-862.

The evidence presented to the grand jury here was merely that the defendant touched the complainant's vagina and buttocks and made her touch his penis; there was no evidence that the defendant overtly threatened the complainant or that serious bodily injuries were actually inflicted. The touching involved was therefore "not sufficiently invasive in nature (as compared to penetration) to create the threat of serious bodily harm." *Id.* at 863. "While the defendant was alleged to have penetrated the complainant, that conduct supported his indictment for rape (with respect to which he was subsequently acquitted), not indecent assault and battery." *Id.* The fact that it was proper to join for trial the indecent assault and battery charges with the rape charges did not mean that youthful offender indictments were permissible as to the former: "joinder does not transform a charge that must be brought as a complaint into a charge that may be brought as an indictment." *Id.* n. 4.

While this decision focused primarily on the sufficiency of evidence presented to the grand jury to obtain the youthful offender indictment, the opinion took pains to provide guidance on the procedures and proof necessary to adjudicate an individual a youthful offender, i.e., at trial. The requirements for youthful offender status, i.e., that would increase the penalty for what would otherwise be merely a delinquency adjudication and commitment to the Department of Youth Services for a defined time period, must be proved to a jury beyond a reasonable doubt. *Id.* at 865-866, citing Apprendi v. New Jersey, 530 U.S. 466 (2000). This means that, in addition to proving to a jury beyond a reasonable doubt the elements of the underlying offense, the Commonwealth must also prove to the jury beyond a reasonable doubt the requirements set forth in G.L. c.119, §54, i.e., that the child was between fourteen and seventeen years old when the alleged offense occurred; that the offense is punishable by imprisonment in State prison; and that one of the following three factors is present: the child was previously committed to DYS, OR the alleged offense involves certain firearms violations, OR the alleged offense involves the infliction or threat of serious bodily harm. "As a practical matter, it would appear that usually only the issue of the infliction or threat of serious bodily harm will be contested[,]" *id.* at 866-867, concerning the "youthful offender" prerequisites apart from the elements of the underlying crime charged.

PLEA, WITHDRAWAL OF ("ADMISSION TO SUFFICIENT FACTS"): IMMIGRATION WARNINGS (G.L. c. 278, §29D)

The defendant admitted to sufficient facts on a complaint charging violation of an "abuse prevention order" under G.L. c.209A, §7. The admission occurred after he had been advised both orally and in writing, as required by G.L. c. 278, §29D, of specific possible immigration consequences. The judge found sufficient facts to warrant entry of a guilty finding, but continued the matter without a finding for one year upon conditions, including completion of a

domestic violence counseling program. Before the year period expired, the defendant moved to withdraw his admission on the ground that the judge had failed to tell him that a continuance without a finding was equivalent to a conviction for immigration purposes and might jeopardize his pending application s for citizenship. (A 1996 amendment to 8 U.S.C. 1101(a)(48)(A) made an "admission to sufficient facts" the equivalent to a conviction for immigration purposes, if the judge orders "some form of punishment, penalty or restraint on the alien's liberty to be imposed.")

The judge denied the motion, but not until after the year period had expired and the charge had been dismissed. He also reported the question, however. The Appeals Court declined to call the matter "moot," because that would penalize the defendant unfairly: he had raised the issue timely enough, and there remained "genuine and serious [possible] collateral consequences." *Commonwealth* v. *Villalobos*, 52 Mass. App. Ct. 903, 904, **further appellate review allowed, 435 Mass. 1104** (2001). On the merits, however, the Court held that the extra piece of advice was not required. Any expansion of the "alien warning statute" is "within the province of the Legislature, not an appellate court." *Id.*

PLEA, GUILTY: PROCEDURES; ADVICE RE: SENTENCE AFTER STRAIGHT PROBATION

The defendant was sentenced on a plea of guilty to two and a half years in a house of correction on a charge of receiving a stolen motor vehicle. At the same time, on the charge of armed robbery while masked, he was "sentenced" to straight probation for a period of two years, to begin upon release from the house of correction sentence. Because he failed to report to his probation officer, the probationary period was extended for two years. Thereafter, he was found to be in violation of probation by committing a number of new felonies. He was then sentenced on the masked armed robbery conviction to a term of from five to seven years. By way of a motion under M.R.Crim.P. 30, he sought to withdraw the guilty plea and obtain a trial, on the ground that the judge's failure to inform him of the sentencing consequences inherent in "straight probation" rendered his guilty plea unintelligent, unknowing, or involuntary. The motion to withdraw the plea was denied, and the defendant appealed. The Appeals Court held that the defendant should have been told, on the record, at the time of his guilty plea, that the consequences of a probation violation on the masked armed robbery conviction would be imposition of a minimum mandatory sentence of five years, and that he would have to serve a minimum of five years (see G.L. c. 265, §17). This holding resulted in no relief, however (any omission in the plea colloquy being harmless), as the defendant had failed to make any record suggesting that there were any weaknesses in the Commonwealth's case or that he had any defense to the charges. "[F]or all that appears ..., his choice was essentially whether to do a five-year stretch in State prison immediately or to try to stay our of trouble for two years after he completed his house of correction time. He was offered and accepted a very favorable disposition of a serious felony charge, for which no other disposition was available except an immediate sentence to a minimum of five years in State prison." *Commonwealth* v. *Rodriguez*, 52 Mass. App. Ct. 572, 582, further appellate review denied, 435 Mass. 1107 (2001).

POST-CONVICTION PRACTICE: DELAY OF TWENTY-FIVE YEARS BEFORE ATTACK UPON CONVICTION SEALS ITS FATE; EVIDENTIARY HEARING UNNECESSARY

A police officer's license to carry a firearm was terminated because of an adjudication of

delinquency of statutory rape of a fifteen year old female when the officer himself had been fifteen years old, some twenty-seven years earlier. (St. 1998, c.180, §41, was the legislation which mandated this ineligibility for firearm licensure, so long after the transgression at issue.) The officer sought to set aside the delinquency adjudication by way of a motion pursuant to M.R.Crim.P. 30(b), but presented only his own affidavit. In it he alleged that his attorney had simultaneously represented three unnamed juvenile co-defendants as well as an adult codefendant, and that there had been a genuine conflict of interest, i.e., the attorney was motivated by the desire to prevent the juvenile clients from disclosing that the adult client had engaged in consensual intercourse with the minor on several other occasions. Alternatively, the officer argued "that the joint representation created a potential conflict of interest that materlialized into actual prejudice when the codefendants, himself included, failed to testify at trial." If he had testified, he claimed, "a significant difference in his level of culpability would have been presented," i.e., while acknowledging physical contact, he denied having sexual intercourse with the complainant. *Commonwealth* v. *Wheeler*, 52 Mass. App. Ct. 631, 634-635 (2001). A trial court judge denied the motion and the Appeals Court affirmed the denial.

While the Court was aware that termination of the defendant's employment after seventeen years on the job was "a harsh result for a youthful transgression," the issue was one of criminal law/procedure. The "presumption of regularity" and "principle of finality" hailed repeatedly in the context of guilty pleas were said to apply as well to convictions ensuing after trial, *id.* at 638, and cited as being "particularly applicable when, as here, [an attack on the conviction occurs only after] adverse consequences appear, especially adverse consequences not contemplated or considered possible at the time of the proceeding." *Id.*

Though the defendant's attorney had specifically eschewed an evidentiary hearing, the Appeals Court saw fit to uphold as a "proper exercise of discretion" the judge's determination to decide the motion on the affidavits without oral testimony. While the issue raised was serious, "the adequacy of Wheeler's factual showing was wanting," amounting only to his "self-serving" and "unsubstantiated" representations that his attorney had represented the codefendants, that his parents never spoke to the attorney about his defense, that he himself had not spoken with the attorney to prepare the case, that the attorney wanted to protect the adult client, and that had he testified, there would have been a different adjudication or disposition. *Id.* 639. While it seems that the defendant could and should have made available the names and the docket sheets concerning the other defendants to prove that there was in fact joint representation, and to show whether the cases were tried together or separately, and to clarify the order of the trials (at least as to the adult and juvenile codefendants), the attorney himself was deceased, as were the defendant's parents, and the trial judge had retired. The defendant was faulted as well for not following through on his promise to produce corroborative evidence from two of the juvenile codefendants, *id.* at 640, n. 13; affidavits from them, from the adult codefendant, or from the complainant may have aided his cause. *Id.* at 640.

POST-CONVICTION PRACTICE: "DISCRETION" OF TRIAL JUDGE TO IGNORE EVIDENCE ON MOTION FOR NEW TRIAL SEEMINGLY LIMITLESS!

The defendant was charged with armed robbery as a joint venturer with two other men. A show-up identification ninety minutes after the robbery yielded a positive identification of the defendant and another male by two witnesses. In the manhunt immediately after the crime, a police dog inflicted injuries upon the defendant, and he was taken, after booking, for medical treatment at a hospital. At trial, the defendant testified, in Chinese, translated by an interpreter.

He testified that he had arranged for a ride to Boston with a particular man, though had not spoken with the man directly because the man did not speak Chinese. The man made several stops, and had several other passengers in the car. The car stopped in Lexington, and three men (but not the defendant) got out; when they were on their way back to the car, however, they fled. Because the defendant did not understand what was happening, he too fled from the car. It is implicit that the defense contested police testimony that robbery proceeds were found on the defendant's person. At trial, much was made by the prosecution of the alleged point that the defendant in fact spoke English perfectly well (and was therefore lying to the jury in the very act of purporting to require the assistance of an interpreter): a police officer testified that, at the hospital, although the defendant initially claimed no knowledge of English, after he was told that it was "in his best medical interests to speak to the doctors," he was able to give his medical history in detail, in English, answering all the doctor's questions without difficulty. *Commonwealth* v. *Wen Chao Ye*, 52 Mass. App. Ct. 850, 853, further appellate review denied, 435 Mass. 1107 (2001).

In an affidavit accompanying the defendant's motion for new trial, the treating physician swore that when he had posed questions and given directions in English to the defendant, the defendant "gave no response whatsoever. He never indicated that he understood what I was saying and never answered in any language." The affidavit further stated that trial counsel had never contacted him. An affidavit from trial counsel acknowledged that he had never contacted the physician, and further stated that he did not recall whether he had even considered contacting the physician, "or, if [he] did consider doing so, any reason [he] may have had for not contacting him." *Id.* at 859-860 n. 4. Nothing much can be said, by way of analysis or justification, for the Appeals Court's affirmance of the trial judge's refusal to give any credit to any assertion in the physician's affidavit. Though it is difficult to imagine why the physician would have lied, the trial judge apparently did not believe that the physician would remember what had happened three years earlier, and found it "'unlikely' that trial counsel had not asked either the defendant or the physician about this matter." *Id.* at 860. It is not possible that the Appeals Court was really so dense as to fail to appreciate the value of such testimony, corroborative of the defendant's credibility and at the same time of devastating impact on the credibility of the police. Its feigned ignorance does not speak well for the panel. ("Even [if the trial judge erred in refusing to accept the assertions of the physician and trial counsel], our conclusion would be no different [, because the defendant was able to convey to the jury, simply by his use of an interpreter at trial,] his assertion that he neither could speak nor understand English." *Id.*) It is noteworthy that the Appeals Court's decision in the appeal of a co-defendant, heard by a different panel, was released on the same day as the decision in this case, and that its statement of the evidence indicates further support for this defendant's version of events. See *Commonwealth* v. *Hoa Sang Duong*, 52 Mass. App. Ct. 861, 863 n. 2, further appellate review denied, 435 Mass. 1108 (2001) (robbery victim and eyewitness testified that only three men got into victim's car and fled after the robbery toward a white car; four men, however, fled from the white car after the police officer almost simultaneously arrived).

PROBATION, REVOCATION OF: HEARSAY (POLICE OFFICER READING HIS NOTES RE: NEW CRIME)

In the hearing to revoke a juvenile's probation, there was only one witness, a Boston police officer, who testified from his "notes" that he had responded to a 1:30 p.m. radio call concerning a breaking and entering in progress at a multi-dwelling building. When he arrived,

he was told by a resident that she saw two suspects enter the premises through the front door, and that when she asked them what they were doing, they told her that they were looking for her son. Ten minutes later, she saw them leave the premises through "the side basement door." Her son stated that a knife was missing from his room. The officer "concluded" that the resident and her son did not want the juvenile in their apartment. He was taken into custody. A neighbor of the woman called the police station later; she said that she had seen two black males, one named "Emmanuel" (the juvenile on probation), leave the premises through the basement door. *Commonwealth* v. *Emmanuel E., a juvenile*, 52 Mass. App. Ct. 451 (2001).

The Appeals Court vacated the orders revoking the juvenile's probation and committing him to DYS custody. There was no finding of good cause for not allowing the probationer to confront adverse witnesses, and the hearsay testimony of the officer fell within no exception to the hearsay rule. The testimony "was fatally devoid of factual detail or corroborating personal observations of the officer sufficient to render it reliable or to establish by a preponderance of evidence that the juvenile committed the charged crime." *Id.* at 454. Even if evidence established the reliability of the officer's testimony, "there was no evidence of a 'breaking' and scant evidence of the juvenile's intent." *Id.* at 455. ***Practice tip.*** The Court noted that Rule 6(b) of the District Court Rules for Probation Violation Proceedings, effective on January 3, 2000, provides that when the sole evidence submitted to prove a probation violation is hearsay, such hearsay evidence "shall be sufficient only if the court finds in writing (1) that such evidence is substantially trustworthy and demonstrably reliable AND (2), if the alleged violation is charged or uncharged criminal behavior, that the probation officer has good cause for proceeding without a witness with personal knowledge of the evidence presented." 52 Mass. App. Ct. at 455 n. 5. The footnote observed that the Appeals Court's decisional law has interpreted Commonwealth v. Durling, 407 Mass. 108, 112 (1990), to permit probation revocation solely on the basis of "hearsay evidence that has substantial indicia of reliability," i.e., without requiring "good cause for not producing the witness." Those decisions predate the effective date of the aforementioned Rules.

PROBATION, REVOCATION OF: ILLEGAL IMPOSITION OF PREVIOUSLY SUSPENDED CONCURRENT SENTENCES BY UN-BUNDLING THEM AND ORDERING THEM SERVED IN INSTALLMENTS

The defendant was not a successful probationer. In 1986, he received a ten year Concord sentence, suspended, with probation for two years; the probationary term was extended, however, until May, 1989. In 1988, he was charged in two separate sets of indictments, and plea bargaining resulted in a sentence of three to five years, Walpole, committed (imposed for two crimes, and to run concurrently with each other), and a seven to ten year sentence (imposed for each of three other crimes, to run concurrently with each other) which was suspended during a period of two years of probation to follow his release from Walpole, whether by parole or wrap-up. This (second) judge also had before him the initial ten year Concord sentence, since the defendant was charged with violating the terms of probation on that sentence. The judge found the defendant in violation of probation, but declined to revoke the Concord suspended sentence and instead extended the probation to run concurrently with the two years' probation on the seven to ten year suspended sentence. *Commonwealth* v. *Chirillo*, 53 Mass. App. Ct. 75, 77, **further appellate review allowed, 435 Mass. 1107** (2001).

The defendant was paroled on the three to five Walpole, but committed another crime while on parole. He was thus surrendered to serve the balance of the three to five year sentence,

and another judge, the third one, also revoked probation on the Concord sentence, and ordered that it be served from and after the time to be served on the balance of the three to five year sentence. Instead of surrendering the defendant on the remaining seven to ten year sentences on the other three cases, "so as to effectuate concurrent committed sentences on all of the previously suspended sentences," this judge extended probation on those three suspended sentences to take effect from and after the committed sentences (i.e., service of the balance of the three to five and thereafter the Concord ten year sentence). Within three days of this order, the defendant moved to revoke and revise this sentence, but the motion was denied without a hearing.

Time marched on. The defendant completed serving the three to five, and the Concord ten, and began probation on the set of three indictments. But within three months, he was arrested for several new offenses, and yet another Superior Court judge (the fourth handling these matters) found him in violation of probation and ordered imposition of the three previously suspended seven to ten year terms, to be served concurrently with each other. About two years later, the defendant filed a motion pursuant to M.R.Crim.P. 30(a), for release from unlawful confinement. The Appeals Court held that the third judge erred in unbundling the Concord ten from the concurrent three seven to ten year sentences: he effectively extended the two-year period of probation on the latter three sentences beyond what was contemplated by the second judge, and if this had not been done, the defendant would not have STILL been on probation when he committed new crimes. "The extension of probation resulted in his incarceration for a violation that occurred after the original period of probation should have expired." Instead of what happened, the judge was required to impose the entire sentence after the probation revocation. A defendant "cannot be required to serve the sentence in installments." *Id.* at 81.

A second holding here was that the defendant did not waive the issue by failing to raise it in his M.R.Crim.P. 29 motion. *Id*. at 80. ***Practice tip.*** The opinion noted that the District Court Rules for Probation Violation Proceedings (not applicable to the present case because made effective only in January, 2000) "provides four exclusive options available to the court once a judge has found a probationer in violation." One is "continuing probation," the second is "termination of probation," the third is "modification of conditions," and the fourth is "revocation of probation," at which time "the judge must order the execution of any suspended sentence in its entirety." *Id.* at 80-81 n.5, citing District Court Rules for Probation Violation Proceedings, Rule 7(d) and (e).

PROBATION, REVOCATION OF: USE OF BAD ACT/ CRIME NOT LISTED IN SURRENDER NOTICE, IN EXERCISE OF DISCRETION AS TO CONSEQUENCE OF PROBATION VIOLATION (I.E., WHETHER TO REVOKE PROBATION OR MERELY CONTINUE IT OR MODIFY CONDITIONS)

The defendant received written notice of a hearing to be held concerning possible surrender because he violated the terms of probation by using heroin and failing to report to his probation officer. At the hearing, the judge found the defendant in violation "based exclusively on those charges." In argument by the parties as to whether probation should be revoked as a consequence of those violations, the judge received and reviewed "a police report and restraining order detailing an incident in which the defendant allegedly slashed the tires on his former girlfriend's car." The defendant's probation was revoked and the originally suspended sentence portion was imposed. The defendant argued on appeal that error had been committed when the judge "considered conduct imputed to the defendant that was not mentioned in the probation surrender notice." *Commonwealth* v. *Herrera*, 52 Mass. App. Ct. 294 (2001).

The Appeals Court held, however, that while it would have been error to use this data in deciding whether the defendant had violated the terms of probation (since the defendant received no notice that this was a basis of alleged probation violation), it was perfectly okay to use it in deciding what to do **after** the decision that the defendant had violated the terms of probation, i.e., whether probation should be revoked (which, under Commonwealth v. Holmgren, 421 Mass. 224, 228 [1995], requires the imposition of the previously suspended sentence). The decision likened this phase to that occurring in regular sentencing, when a judge exercises discretion and "may take into consideration the defendant's past, uncharged misconduct without offending due process principles." If the evidence of uncharged misconduct is "reliable," due process principles are not offended by a judge's use of the information in her "discretionary decision whether to revoke probation or modify conditions [.]" 52 Mass. App. Ct. at 295.

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT, INVITING INFERENCES CONTRARY TO EVIDENCE PROSECUTOR SUCCEEDED IN HAVING EXCLUDED (ERRONEOUSLY)

See *Commonwealth* v. *Schutte*, 52 Mass. Ap. Ct. 796, 800 n. 4 (2001), summarized at ***EVIDENCE: MEDICAL "REPORT" (G.L. c.233, §79G) EXCLUSION = REVERSAL; STATE POLICE MANUAL INADMISSIBLE (FIELD SOBRIETY TESTS' ADMINISTRATION)***.

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT, INVITING INFERENCES UNSUPPORTED BY EVIDENCE (GUILT MERELY BY ASSOCIATION)

Acting on "intuition," an officer on patrol followed a vehicle and called in its license plate number for a Registry check. After the vehicle's occupants had stopped and purchased hamburgers at a Burger King, the Registry conveyed information to the officer that the license plates had been stolen; it was later determined that the car itself was also stolen, separately. Still following the vehicle, the officer requested assistance and stopped the vehicle when such "assistance" had joined him. In the vehicle were a male driver, a female in the front passenger seat, a four-year-old girl in the seat behind the female, and the defendant in the seat behind the driver. The driver ignored the officer's order to all occupants to "show their hands," even after the officer drew his gun; the driver instead began to push something under the front seat beneath him. The defendant and other passengers had immediately and continuously obeyed the "hands in the air" order. During the driver's struggle with the officer[s], the defendant sat watching with his hands in the air; he was taken by the arm and "escorted" from the car during the struggle at some point, however. On the sidewalk, he merely stood with two officers while the struggle wound down. A digital scale was found under the driver's seat and an unstated quantity of some sort of "narcotics" was found in a container located between the accelerator and the brake pedal. *Commonwealth* v. *Thomas*, 52 Mass. App. Ct. 286 (2001).

After the driver was subdued, the defendant was led away a short distance and was questioned about the driver's identity. Because he gave "unsatisfactory answers," he was arrested for "proceeding in a stolen motor vehicle." Thereafter, police purportedly found, on the sidewalk where the defendant had been standing earlier, a plastic bag containing eleven or twelve small tin-foil packages. The packages contained a total of 2.4 grams of "crack" cocaine. The defendant was charged with possession of this crack cocaine with the intent to distribute it, and in a separate complaint with "school zone" enhancement. These were "dime" bags, typically bought by an addict one at a time, according to a "narcotics expert" cop testifying at trial, and

could cost as much as $20 apiece. The defense was, first, that the defendant had no affiliation with the sidewalk bags, and second, that even if he had possessed them, the evidence could not support a finding of an intent to distribute.

In urging the "distributive" intent, the prosecutor urged the jurors to infer guilt from the defendant's presence in the car which had contained a digital scale and "crack cocaine," notwithstanding the fact that there was no evidence about the kind of drugs found in the container on the front floor of the vehicle. The Appeals Court reversed the defendant's convictions: "apart from the defendant's association with the driver and his presence in the car, there was nothing in the evidence, let alone a preponderance of that evidence ..., to support a reasoned inference that the defendant knew of or had access to the front-seat scale or drugs[,]" and "association is a fundamentally impermissible basis on which to urge an inference of guilt." *Id.* at 293. The decision noted that the relevant evidence was itself "barely enough" to support the convictions; because of this, the impermissible closing argument could not be found harmless. *Id.*

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT, NAME-CALLING, UNSUPPORTED INFERENCES

The defendant was convicted of sexual assaults upon the minor daughter of his girlfriend, with whose family he had lived for more than a decade. The complainant's mother, who did not corroborate the complainant's story, was questioned by the prosecutor as to "whether she recalled having failed to show up on several occasions for counseling sessions with [her daughter], after [she] had made the allegation of sexual abuse." The mother responded that she did not have a car, and further, as an inexperienced driver, could not drive around Boston. The prosecutor then sneered, "And with all the family and with all the friends you have up here, you couldn't find anybody to give you a ride down to Boston, so you could sit in with your daughter on a counseling meeting. Is that what you're telling us?" The witness replied that "I didn't find nobody. Everybody works, sir." It was error for the prosecutor to argue in closing that the mother could have gotten a ride from one of the "fifteen or so people sitting in the back of the courtroom." *Commonwealth* v. *Rivera*, 52 Mass. App. Ct. 321, 327 (2001).

The prosecutor also erred in wholly improper "name-calling" when he attacked a defense witness as "nothing more than a seventeen-year-old punk," "a stooge who was brought in here." The witness had testified that after hearing about the allegations, he had approached the complainant at school and asked her whether the defendant "had sex with her," and that she had replied, "no." There was no relief for the defendant, however, as the Appeals Court found as to the first harmlessness and as to the second, no substantial likelihood of a miscarriage of justice. *Id.* at 327, 328.

The Court refused to find error in the prosecutor's comment regarding the complainant, that "she didn't have to subject herself to the humiliation of talking to countless strangers about horribly embarrassing personal experiences in her young life," despite the defense claim that this was improper "vouching" for the complainant's credibility. *Id.* at 325. The comment, said the Court, was like an argument in a prior case, i.e., "what reason would the victim have to come into this courtroom, stand on that witness stand, and testify ... if this were pure fantasy...? What is her motive?" *Id.*, citing Commonwealth v. Krepon, 32 Mass. App. Ct. 945, 946 (1992).

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT, PERSONAL BELIEFS

At the close of evidence at trial of indictments for larcenies by false pretenses, allegedly a

"Ponzi scheme" by a man retained to make and oversee financial investments for four families, the prosecutor told the jury that "there are very few cases that a prosecutor presents to a jury in which you really get the feeling that you are representing the Commonwealth in the sense of the definition of Commonwealth." This "carried an aroma of personal belief in the case and should have been left unsaid." *Commonwealth* v. *North*, 52 Mass. App. Ct. 603, 611, further appellate review denied, 435 Mass. 1108 (2001).

SEARCH AND SEIZURE: ADMINISTRATIVE INSPECTION AS PRETEXT FOR CRIMINAL INVESTIGATION / SEARCH; OBJECTIVE BASIS LACKING FOR PROFESSED "FEAR" OF DEFENDANT; UNNAMED, THOUGH KNOWN, INFORMANT SUBJECT TO SAME 'RELIABILITY' ANALYSIS AS UNKNOWN TIPSTER

At Suffolk Downs race track, a state police trooper was approached by a confidential informant who told him that earlier in the day as well as on preceding day he had been approached by a person identified as "Rosenthal," who had offered to sell him cocaine; the informant told the trooper that Rosenthal was in Barn 16, that Rosenthal probably had drugs on his person, and that the officer should go immediately as Rosenthal would be leaving soon. The informant did not provide a description of Rosenthal and did not claim to have seen any drugs. The informant himself had been the subject of an investigation concerning illegal use of social security numbers, and was induced to be the "eyes and ears" of the police in exchange for some assistance with his own legal issues; he was given one week to provide information regarding drug problems at the track.

The trooper hurried to Barn 16 and saw a man and a woman working with a horse. The man identified himself as Rosenthal, and the trooper identified himself as a state trooper and told Rosenthal that he needed to search Rosenthal's tack room and wanted Rosenthal to be present. The defendant, Rosenthal, acquiesced, and accompanied the trooper to the tack room. As they walked, the trooper saw a plastic bag sticking out of the defendant's sweatshirt pocket and saw bulges in each of his sweat pants pockets. At the trooper's behest, the defendant showed the contents of the plastic bag: medals to be worn on a chain. Inside the tack room, the trooper asked the defendant what was in his pockets. Though the defendant emptied his left pants pocket and showed a wallet, he became agitated when the trooper pressed him for the contents of his right pants pocket. He said there was nothing in it and demanded to see his Horseman's Union representative. When the trooper reached for the pocket (to "pat" it, said the Court's opinion), the defendant backed up, with hands out of the pockets and raised. At this point, the trooper purportedly told the defendant he was in fear for his life and would search the defendant unless shown what was in the pocket. The defendant pulled out five folded foil packets; the trooper reached into the pocket and retrieved, additionally, a plastic bag with more folded packets, found to contain cocaine. *Commonwealth* v. *Rosenthal*, 52 Mass. App. Ct. 707 (2001).

The drugs should have been suppressed. Police may not use the pretext of an administrative search to detain a suspect in a criminal investigation where there is no other lawful basis to justify that action, and here, it was clearly established that the search was initiated solely to investigate criminal activity. *Id.* at 715. There were other useful holdings in this case. First, the requirement for establishing reliability of the informant would not be "relaxed" simply because the informant's identity was known to the trooper. *Id.* at 710-711 n. 7. Second, despite the trooper's statement that he was "afraid," there was no objective basis for any fear. Notwithstanding the motion judge's creative allusion to the fact that the trooper was "aware that horse trainers often carry, on their person, tools of the trade that include knives and scissors," the

Appeals Court refused to countenance this pretextual justification for searching the defendant's pocket. If the trooper had actually patted down the pocket, he would not have felt anything that would have alerted him to the possible presence of a weapon. *Id.* at 715-716 n. 12.

SEARCH AND SEIZURE: AFFIDAVIT'S ABSENCE, MOTION'S INADEQUACY

A police officer conducting surveillance for drug activity professed to have seen the defendant walking from the side of an apartment building to the sidewalk, to have seen a Hispanic male (Fargas) approach him, and to have observed the two men walking toward the rear of the building where the defendant reached toward a garden hose and pulled out a clear plastic bag, drew a small white item out of the larger plastic bag, and threw it to Fargas. Fargas walked back to the sidewalk and went down the street, and was seen to open the bag and sniff it before resealing it and putting it in his left sock. The officer radioed cohorts, who stopped Fargas, found cocaine in his sock, and arrested him. The defendant, meanwhile, had returned the plastic bag to the hose, and had departed from the area as a passenger in a pickup truck which had pulled into the driveway. When the defendant left a restaurant later, he was arrested and found to have $130 on his person. Officers searched the hose area and found six individually-wrapped bags of cocaine in a larger plastic bag. *Commonwealth* v. *Zavala*, 52 Mass. App. Ct. 770 (2001).

The defendant filed a motion to suppress evidence seized as a result of the warrantless searches of Fargas, the hose area, and the defendant himself, but he attached no affidavit. On the day after a suppression hearing on the motion had been scheduled, but had not occurred, the defendant filed an affidavit. The affidavit stated merely that on November 8, 1996, police officers searched Fargas, an area adjacent to 21 Jefferson Avenue, Springfield, and the defendant's person; that during those searches, a quantity of alleged controlled substance was seized, "as well as other items;" that the defendant had made "certain statements" in response to custodial questioning; and that he was subsequently charged with crimes. When the case was called for trial, the defendant sought a hearing on the suppression motion. The judge questioned counsel why no affidavit had been filed with the motion originally and why the motion had not been heard when scheduled. Neither the judge nor the Appeals Court believed that the affidavit and motion were adequate under M.R.Crim.P. 13, despite the defendant's argument that the affidavit's lack of detail should be excused because the defendant wasn't present during the searches of Fargas or the hose area, and had no personal knowledge of them. *Id.* at 773. The affidavit, however, contained no factual assertions supporting even the search of the defendant's own person. The motion itself was assailed as setting forth "a veritable laundry list of possible grounds for suppression," lacking any particularity; it had asserted that "said evidence was not seized pursuant to a lawful arrest, was not in plain view, there was no probable cause, no warrant, no exigent circumstances, it was not seized pursuant to a lawful stop-and-frisk, the search was not consented to, and the evidence was seized in violation of" the state and federal constitutions. *Id*. at 773 n.3.

Furthermore, nothing in the docket entries supported trial counsel's assertion that some previous judge had stated that the suppression hearing could be heard at the time of trial, provided that the defendant would waive his right to an interlocutory appeal in the event of an adverse ruling. While upholding the judge's refusal to hold a hearing on the motion, the Appeals Court held that the motion should have been denied even if there had been a hearing: (1) the observations of the police officer alone "provided probable cause" to arrest the defendant and the search of his person was lawful as an incident to that arrest; (2) he had no expectation of privacy in the hose area; and (3) he "may not have had standing to challenge the search of Fargas." *Id.* at

775. ***Practice tips***. Upon pain of forfeiting critical legal arguments, make sure that the docket reflects oral judicial "orders" that motions be heard immediately prior to trial instead of at the time pretrial conference agreements set for them. Furthermore, demand whatever discovery is necessary as a prerequisite to factual assertions germane to a motion to suppress. It will still be true that neither defense counsel nor the defendant will have the "personal" knowledge purportedly required of a supportive affiant, but counsel must assert personal knowledge of what the searching officers claim to have occurred.

SEARCH AND SEIZURE: EXIGENT CIRCUMSTANCES; SEARCH INCIDENT TO ARREST; INEVITABLE DISCOVERY

The defendant arrived at the home of a woman for whom he had been doing carpentry work. He was intoxicated, argued with the woman and her friend, and threatened to return to the premises with a shotgun. The woman called the police, and three officers drove to the defendant's office, which was located in a warehouse type of building across the street from his residence. At the commercial building they saw the defendant's car parked haphazardly, with the driver's door open, and a door to the building was also open. The officers went inside, and smelled burning marijuana. As they ascended steps toward the defendant's office, the smell became stronger. In the office, the defendant was talking on the telephone, but terminated his conversation on their request. The officers saw a package of "used" rolling papers on top of a rubbish barrel. They told the defendant to stand up and step around from the back of the desk, and handcuffed him after he complied. Without giving Miranda warnings, they asked the defendant where the marijuana was, and he answered that it was in his desk drawer. The officers thereafter opened the drawer and seized fifty-six grams of marijuana. *Commonwealth* v. *DiMarzio*, 52 Mass. App. Ct. 746, **further appellate review allowed , 435 Mass. 1105** (2001). A district court judge denied the defendant's motion to suppress, on the grounds that exigent circumstances authorized police to enter the premises, that there was probable cause to arrest the defendant for possession of marijuana, and that the doctrines of inevitable discovery and search incident to arrest overcame the acknowledged violation of Miranda v. Arizona. *Id.* at 752. The Appeals Court reversed the ruling, and ordered suppression.

The Court did agree that exigent circumstances (the "combustible combination of a gun, intoxication, and conflict") and the situation at the warehouse (car and door placement suggesting the defendant was "in a rush") made it reasonable to enter the premises through an open door, peaceably, in broad daylight. *Id.* at 751. In holding that search of the drawer was not permissible as a search incident to arrest, the opinion rejected the applicability of the "inevitable discovery" rationale. Under G.L. c.276, §1, a "search incident to arrest" in this Commonwealth "may be made only for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape." There was no suggestion that the police were concerned about their safety or looking for a weapon in the drawer, said the Court, *id.* at 754, and "virtually no possibility of the defendant reaching into the desk drawer and destroying the marijuana evidence given the presence of three officers, the handcuffs, his position on the opposite side of the desk, and the absence of others in the room to help him." *Id.* at 753. (The Court also criticized the Commonwealth for "glossing over" the factual issue of whether a search of the drawer would have taken place absent the improper questioning. *Id.* at 752.) Finally, "the inevitable discovery rule does not authorize 'admission of evidence seized in violation of the requirement that a search

warrant be obtained, even if it was inevitable that, if sought, a search warrant would have been issued and the evidence would have been found.'" *Id.*, n. 7 (citations omitted).

SEARCH AND SEIZURE: MILITARY BASE, LOCKER OF DEFENDANT

The defendant was convicted of murdering his girlfriend and their two sons, who were, respectively, two months and four years old. Though the girlfriend's body was found in her home, the two boys were missing; the defendant was known to have been at the Air National Guard base after being at the girlfriend's home from around 1 a.m. to 6 a.m. Military Rule of Evidence 315 defines "authorization to search" as an express permission, written or oral, issued by competent MILITARY authority to search a person or an area for specified property or evidence or for a specific person. The same rule defines in like terms a "search warrant," the distinction being that the warrant is issued by competent "civilian" authority. There was an "authorization to search" the defendant's two "rooms" at the Air base, and although neither child was found, a dirty diaper, empty yogurt containers, and the defendant's wet and sandy army fatigues were found. Authorities hoped that the children might still be alive but hidden somewhere on the base. Authorization to search the entire base was obtained at about 4 a.m. on the morning of the day after the girlfriend was murdered. Two Guard sergeants, colleagues of the defendant, discussed their hope that the allegations against him were untrue, but during this discussion one purportedly mentioned that the defendant had told him some two months earlier, that he was storing ammunition in his "gear locker in building 868 located on Outer Road" at the Air base, a building used "strictly for [Guard] members' performance of their official duties." Ammunition left over from training exercises or missions, however, is supposed to be returned to the armory, and "[i]mproperly stored ammunition is contraband." Military officials thereafter decided to search the locker due to "safety concerns." The lock was cut with bolt cutters, and loose rounds of ammunition were found. In checking a crate at the bottom of the locker for further ammunition in metal canisters customarily used for storing ammunition, one searcher removed from atop the crate a clear plastic bag containing a knapsack. After several comments on its unusual heaviness, a State trooper who had accompanied the military searchers asked whether the military were "issued ... weapons or ammunition that would fit in such size of a bag." One of the searchers then opened the outer plastic bag, unzipped the knapsack itself, and pulled open the plastic bag inside the knapsack. The hand of a small child was then seen. Two small dead bodies were inside the plastic bag. The SJC held that suppression of this evidence was properly denied, since the motion judge credited testimony that the search had been initiated solely due to concern that the safety of government property and personnel might have been compromised by the improper storage of ammunition. *Commonwealth* v. *Contos*, 435 Mass. 19, 35 (2001). Furthermore, the defendant did not have a reasonable expectation of privacy in the locker, which was "government issued for the purpose of storing and securing gear such as helmets [all "government property"]... used in ANG training missions." *Id.* at 36-37. The Court did see fit to "note" that it was "troubled by the fact that [the defendant's friend's] information about the improper storage of ammunition dated back ... some two months before the search." Concern as to "staleness" would affect only cause to believe contraband was present, and would not alter the conclusion that the defendant did not have a reasonable expectation of privacy in the gear locker. *Id.* at 36.

SEARCH AND SEIZURE: MOTOR VEHICLE; REASONABLE APPREHENSION OF DANGER JUSTIFYING PAT-FRISK ABSENT HERE

At 1:10 a.m. on a February night in a "high crime" area in Roxbury, a state trooper purportedly saw a vehicle directly in front of him weaving across marked lanes. As the trooper closed the four to five car length distance between his cruiser and the weaving vehicle, the other driver was seen to "look in the rear-view mirror" and then to lean "dramatically to his right with both his upper torso and his arm toward the passenger's side visor." The trooper activated his lights, and the other driver stopped in the travel lane; at the trooper's behest via microphone, the driver pulled over to the side of the road. The trooper approached the driver's side, while his partner took a "cover" position. The driver (later to be the defendant) was the only person in the stopped car. *Commonwealth* v. *Holley*, 52 Mass. App. Ct. 659 (2001). Because of the "high crime" nature of the area and his suspicion that the defendant had either hidden or retrieved something when he reached to the right (and perhaps also because the defendant was nervous and sweating even though it was a cold night), the trooper opened the vehicle door and told the defendant to get out and put his hands of the car. The defendant obeyed, and the trooper immediately felt the defendant's right pants pocket, which contained a hard object recognizable by the trooper as a handgun. Subsequent events turned up a bullet in the chamber (conviction of ammunition possession), observation that the gun's serial numbers had been removed (conviction under G.L. c. 269, §11C), a glassine bag containing crack cocaine, $1,600 in cash, and three beepers (conviction of possession of cocaine with intent to distribute).

The Appeals Court held that the defendant's motion to suppress should have been allowed, and ordered that all convictions be reversed and judgments of not guilty be entered. *Id.* at 666. The suppression motion had focused upon whether the patfrisk was improper, but thereafter the SJC made a significant art. 14 ruling as to the necessity of a reasonable belief that someone's safety is in danger before a driver may be ordered out of a vehicle. See Commonwealth v. Gonsalves, 429 Mass. 658 (1999). Despite the parties here briefing the latter point on appeal instead of the one which was litigated below, the Appeals Court hewed to the issue raised on the record in this case, and noted that the result would be the same anyway, because "the standard for a patfrisk is the same as the standard required to justify an order to the occupants of a vehicle stopped for traffic violations to leave the vehicle." 52 Mass. App. Ct. at 662. The most noteworthy point in this case is the Court's unwillingness to uphold denial of suppression despite the motion judge's use of the buzz word "furtive gesture." Contrary to the judge's findings of fact, the trooper did NOT testify that the defendant reached down toward the floor or into the "well" between the seats, *id.* at 664. The trooper also did NOT testify that he began frisking at the right pocket because he thought that the defendant had placed something there, and there was nothing to support the judge's "factual" finding to this effect. *Id.* at 663-664. The case for propriety of a pat frisk here was lacking: there was a routine traffic stop in a high-crime area and "an ambiguous gesture which, at best, could not be deemed to be either furtive or threatening." *Id.* at 665.

SEARCH AND SEIZURE: "PLAIN VIEW" (ILLEGALITY MUST BE APPARENT IF ITEM IS BEYOND SCOPE OF WARRANT AUTHORIZATION; SEIZURE OF 'MERE EVIDENCE' PERMITTED ONLY IF RELATED TO CRIME OF WHICH SEARCHERS ARE ALREADY AWARE)

Following the arrest of a woman who delivered drugs to undercover troopers at a rendezvous facilitated by known but previously untested informants, police were fearful that the woman's failure to return to the defendant's apartment, which was believed to be the center of the drug operation, would tip off the defendant to destroy evidence. Police went to the apartment to

"secure" it pending issuance of a search warrant, and at least one officer made a "protective sweep" of the apartment. That officer entered an area which was set up like an office and noticed there "computer equipment together with a small black box." The officer thought that this might be cellular telephone cloning equipment, and "suspected those items could be used for an unlawful purpose but was not sure." The defendant had been placed under arrest for cocaine trafficking, and two officers were left to "secure" the premises. Police then applied for and obtained a search warrant solely for the seizure of evidence related to illegal narcotics distribution. While preparing the application, however, the officer who had conducted the "sweep" contacted a trooper who had special training with the cellular telephone fraud unit. As a consequence of this contact, the state trooper assembled an extra search team familiar with and specially trained in cellular fraud, and this extra search team arrived while police were executing the 'narcotics' search warrant. The cellular telephone specialists combed the apartment and its storage areas. They tested and seized a cell phone, and seized also a scanner and programmer, a list of "MIN and ESN numbers" which could have been generated by the scanner, computers and other electronic equipment. Some of the devices were illegal, being used "exclusively to clone cellular telephones." *Commonwealth* v. *Cruz*, 53 Mass. App. Ct. 24, 28-29 (2001).

The Appeals Court believed that the search by the specialized officers was made without a finding of probable cause by a magistrate and without a warrant to circumscribe what in fact became a more "general" search, prohibited by the particularity requirements of article 14 and G.L. c.276, §2. Furthermore, the Court rejected the Commonwealth's argument that the "plain view" doctrine made seizure of the cellular equipment proper. Under the plain view doctrine, seizure of peoperty not described in a warrant is permissible if (1) officers are lawfully in the place where the seized items are observed, (2) the incriminating character of the object seized is immediately apparent, and (3) the officers have a lawful right of access to the object. (The SJC may or may not retain a fourth qualification which has been rejected by the US Supreme Court as a matter of Fourth Amendment jurisprudence, i.e., that the item must have been come across "inadvertently." See cases cited *id.* at 33 n.7.) The incriminating character of the objects was NOT "immediately apparent" to the officer conducting the protective sweep, though he obviously had "suspicion" that they were illegal material. Thereafter, even the officer with specialized expertise had to "test" the cellular telephone to determine that it was counterfeit, "requir[ing] the conclusion that the object's incriminating nature was not immediately apparent." *Id.* at 35. "[U]se of the concept of a protective sweep search and of the plain view doctrine can present a potentially far-reaching encroachment on the rights protected by art. 14 and the Fourth Amendment to the United States Constitution. This case graphically illustrates how police, by clever resort to these doctrines, can entirely circumvent the warrant requirement." *Id.* at 36. "[W]here 'mere evidence' of criminal activity is observed in plain view, it may be seized without a warrant only if 'officers recognize it as plausibly related to *criminal activity of which they were already aware.*'" *Id.* at 35 (emphasis in original). The defendant's suppression motion concerning the cellular telephone and related cloning equipment should have been allowed. *Id.* at 37.

SEARCH AND SEIZURE: PROBABLE CAUSE; "NEXUS" TO CRIME/EVIDENCE AND PLACE SEARCHED NOT SHOWN IN WARRANT APPLICATION; ADMISSIONS UNTAINTED BY PRIOR ILLEGAL ENTRY

The body of a woman was found in the water off Nantucket on a Sunday morning. Police developed a list of her acquaintances, and this list included the defendant, one Dunham, and a

couple who resided at 38R Hooper Farm Road. Sometime on Sunday, officers went to this address, and spoke with the couple "at the entrance to the house." The man told the officers that he had heard of the victim's death, and both the man and woman responded to questions about the defendant with the answer that they had last seen him on Saturday night. During the conversation, one of the officers received a "page," and in an ensuing call learned that someone reported having seen the defendant arrive at the Hooper Farm residence earlier on Sunday, and that his truck was still parked beside the house. When the couple was confronted with this information, they acknowledged that the defendant was in an upstairs bedroom. *Commonwealth* v. *Chongarlides*, 52 Mass. App. Ct. 366, further appellate review denied, 435 Mass. 1104, 1106 (2001).

The two officers entered the house with drawn guns and without announcing their presence. They surprised the defendant as he sat on a couch smoking a cigarette and watching television in an upstairs bedroom. He was ordered to keep his hands where they could be seen and questioned as to whether he had any weapons. A knife on his belt, indicated by him, was secured by the police, and a pat-frisk followed. He was told that the police wanted to ask him questions about the death of the victim, and was read Miranda rights. He agreed to go to the police station to give a statement, saying he had "nothing to hide." After transport in the back of a police cruiser, he was again read Miranda rights, and signed a waiver. He was questioned for about three hours, and provided a handwritten statement. Though his initial versions of events were "largely exculpatory," police confronted him with the version of events being given by Mr. Dunham in an adjacent area. He then acknowledged that he had arrived at Dunham's place on Friday night and found Dunham and the victim to be already high on heroin, that he had himself taken some heroin then and passed out, and that when he woke up on Saturday morning, the victim was dead. He claimed that he and Dunham performed CPR on the victim for an hour, but that he left the apartment, distraught, when she could not be revived. He denied that he had supplied the heroin or that he had any role in disposing of the body, points disputed by Dunham. *Id.* at 374-375.

In ruling on the defendant's motion to suppress these statements, a judge assumed that the police entry into the residence was illegal. The motion judge, and the Appeals Court in an interlocutory appeal, however, found that the eventual inculpatory statements were sufficiently removed in time, space, and circumstance from that illegality so as not to have been tainted by it. *Id.* at 375-377.

The defendant's motion to suppress items seized on Monday pursuant to a warrant to search the Hooper Farm Road residence had been allowed, and this holding was also upheld by the Appeals Court. The affidavit supporting the application for the warrant failed utterly to provide a nexus between the place at which the victim suffered a fatal overdose of heroin, i.e., an apartment on Union Street, and the Hooper Farm Road dwelling. It was not even properly inferable, from the affidavit, that the defendant lived at the latter residence, and even if he had, "[i]nformation establishing that a person is guilty of a crime does not necessarily constitute probable cause to search the person's residence." *Id.* at 370 (citation omitted). That the defendant had allegedly brought heroin to the Union Street apartment did not indicate that the drug had previously been stored on Hooper Farm Road, and provided no reason to believe that, after two days of drug use by three persons, the defendant still possessed drugs almost three days later. *Id.* at 371.

SEARCH AND SEIZURE: REASONABLE EXPECTATION OF PRIVACY IN

WORKPLACE

See *Commonwealth* v. *Ye*, 52 Mass. App. Ct. 390, 394-395, further appellate review denied, 435 Mass. 1107 (2001), summarized at ***COUNSEL, INEFFECTIVE ASSISTANCE: FAILURE TO MOVE FOR SUPPRESSION***.

SEARCH AND SEIZURE: REASONABLE EXPECTATION OF PRIVACY POSSESSED BY TAXI PASSENGER; REASONABLE SUSPICION OF CRIMINALITY; "FURTIVE GESTURE"

Four plain clothes officers in an unmarked police vehicle came to be behind a taxi at about 8:20 p.m. in Roxbury. The taxi's passenger looked back in the direction of the officers. Shortly thereafter, the taxi began to make a left turn, but abruptly swerved back to the right, almost hitting an oncoming vehicle. An officer activated the police vehicle's emergency lights and siren and stopped the taxi for "the observed motor vehicle infraction." *Commonwealth* v. *Hooker*, 52 Mass. App. Ct. 683 (2001). The officer saw the taxi passenger "moving his shoulders back and forth," and surmised that he was putting something on the rear seat. This officer approached "the passenger side" of the taxi, and then recognized the passenger as someone he had arrested twice in the past, most recently two years earlier, in connection with a stolen motor vehicle. The passenger had purportedly been violent and unruly in the past, and verbally abusive to the officer. Another officer was obtaining license and registration from the taxi driver, who said that he had started to turn onto the street, but the passenger abruptly directed him not to go there. The first officer, meanwhile, "opened the taxi door to 'tell the defendant [passenger] the reason for the stop[,]'" but then questioned why he had not wanted to go down the intended street. The defendant replied that he believed that the police would follow him and that it was "hot" with the police behind him. The defendant seemed nervous, so the officer "asked" him to get out of the taxi, believing that he might have disposed of some items and wanting to check the back seat. After the defendant got out, the officer leaned into the taxi and lifted the defendant's jacket, finding cocaine underneath it.

Although a District Court judge denied the ensuing motion to suppress on the apparent ground, among others, that the defendant had no expectation of privacy in the taxi, *id.* at 685, the Appeals Court reversed that order and the defendant's conviction. Several citeable propositions appeared. (1) "[T]he defendant did have a reasonable expectation that the police would not arbitrarily order him from the taxi and look beneath a jacket he had placed on the seat[,]" notwithstanding the diminished expectation of privacy inherent in the interior of a motor vehicle which is visible to others during navigation on any public way. (2) Under art. 14 of the Declaration of Rights, police are prohibited from ordering a driver or passenger out of a lawfully stopped vehicle without reasonable apprehension of danger to an officer or others. *Id.* at 685-686 and n.2 (citations omitted). (3) The defendant's looking back at the following vehicle before the stop was "not remarkable" generally, and was even less so given that the vehicle was not marked as a police car, its occupants were in plain clothes, and the neighborhood was a "high crime area." Mere movement is not a furtive gesture. *Id.* at 686-687. (4) "[A] defendant's desire to avoid an interaction with police, without more, does not create reasonable suspicion ... or reasonable apprehension of danger [.]" *Id.* at 687. (5) Gestures consistent with placing something on the seat are not indicative of criminality and are not a ground for reasonable apprehension. *Id.* (6) EVEN IF the officer's questioning the defendant as to why he did not want to turn down the particular street was permissible, the defendant's answer did not provide a reasonable suspicion of criminal activity. *Id.*, n. 5. (7) The defendant's alleged "nervousness"

was not unusual and provided no reason to fear violence. *Id.* at 688. (8) Regardless of the officer's characterization of his language as a "request" that the defendant get out of the taxi, it was, given the circumstances, a "command." *Id.* ***Practice tip.*** The Court left open the issue whether the officer's opening of the taxi door was itself a constitutional intrusion made without justification. *Id.*, n. 6.

SEARCH AND SEIZURE: REASONABLE SUSPICION BASED ON FLIGHT FROM POLICE?

When police officers saw a car drive past "at an excessive rate of speed" at 3:30 a.m., they followed it with "emergency lights" on. The car "rolled through a stop sign" and stopped in the middle of an intersection in a high crime area. The defendant emerged from the passenger side door, looked to the left and right, and then fled, clutching his chest as if holding something in his shirt. The driver sped away. Police chased the defendant, who threw a plastic bag onto a roof. A large quantity of cocaine was found in the plastic bag. Four baggies of marijuana were found in the defendant's pants pocket. The Appeals Court rejected the defendant's claim that the police lacked reasonable suspicion to pursue the defendant. The defendant's flight from the car could be taken into account, notwithstanding his citation of Commonwealth v. Thibeau, 384 Mass. 762, 764 (1981). In Thibeau, the pursuit of the defendant, based only on a hunch, preceded the flight, and the Court ruled essentially that the police could not manufacture reasonable suspicion by illegitimate pursuit. Flight is a relevant factor if it has not been triggered by inappropriate police action. *Commonwealth* v. *Wilson*, 52 Mass. App. Ct. 411, 415, further appellate review denied, 435 Mass. 1108 (2001).

SEARCH AND SEIZURE: REASONABLE SUSPICION (REPORT OF GUN POSSESSION); POINT OF "STOP"; "FACE-TO-FACE" ANONYMOUS TIPSTER TO BE TREATED LIKE ANONYMOUS TELEPHONE CALLER RE: RELIABILITY/BASIS OF KNOWLEDGE INQUIRY

A middle-aged white male told a Brockton police officer on the street that he did not want to identify himself beyond the fact that he was a businessman who worked on Main Street, but that he had seen a light-skinned Cape Verdean male, about 5' 6" tall, wearing a blue and white T-shirt and blue jeans, take a handgun from his waistband and show it to others who were with him. The officer, on duty and in uniform and driving a marked cruiser, went to the area of Main and Hancock Street, and within about three minutes of receiving the tip saw a group of Cape Verdean males, one of whom matched the description given by the informant. The officer drove alongside the group and said, "Hey you ... I want to speak with you," but although the defendant looked at the officer, he kept walking. The officer then stopped his cruiser, got out, walked up to the defendant and, as two other officers arrived, pointed at him and said, 'Hey you. I wanna talk to you. Come here.'" The defendant then stopped, and purportedly moved his hands toward the front of his waistband, prompting the officer to draw his gun and order the defendant to raise his hands, a command repeated before the defendant obeyed. Purportedly because the defendant took four steps backward even as his hands were raised, the officer was "concerned that the defendant would flee," so he handcuffed and pat-frisked him, removing a loaded handgun from the defendant's waistband. When asked whether he had a license to carry the firearm, he said that he did not. *Commonwealth* v. *Barros*, 435 Mass. 171, 172-173 (2001). A District Court judge denied suppression, but the Appeals Court (49 Mass. App. Ct. 613 [2000]) and the SJC held that suppression should have been ordered.

First, five of the seven SJC justices held squarely that **"face-to-face" anonymous informants are to be treated no differently from unnamed anonymous telephone callers**: evaluation of the tip's indicia of reliability must focus on the informants' reliability and basis of knowledge, and while "[a]n accurate description of a subject's readily observable location and appearance ... will help police correctly identify the person whom the tipster means to accuse [,] [s]uch a tip ... does not show that the tipster has knowledge of concealed criminal activity." 435 Mass. at 176-177, quoting from Florida v. J.L., 529 U.S. 266, 272 (2000). Contrast 435 Mass. at 181 n.5 (concurring opinion, expressing view that anonymous informant here was sufficiently reliable). Second, there was indeed a seizure in this case, at the point at which the officer got out of his cruiser and, for the second time, "requested" that the defendant "come here" for interrogation by the officer. 435 Mass. at 176. Third, EVEN IF THE TIP WERE RELIABLE (and mere corroboration that the informant had accurately described a nearby person did not make the tip reliable), the officer did not have a reasonable suspicion that the defendant was doing anything illegal to justify the seizure. Carrying a gun is not a crime. *Id.* at 177. A concurring opinion representing the views of two justices provided, as did an opinion in the same case by an Appeals Court justice, coaching as to what testimony by the officer may have saved the case by purportedly establishing reasonable suspicion of illegality (but only if the tipster could have been found reliable/credible as to the report of the gun) . If the officer had claimed that the defendant looked so young that he couldn't have been as old as eighteen, there would purportedly be reasonable suspicion because at the time of stop no license to carry a gun could be issued to anyone under age eighteen. (The statute has since been amended to make twenty-one the minimum age for obtaining such license.) This same opinion found "intriguing" the suggestion, not adequately briefed by the Commonwealth here (*id.* at 179-180), that a police officer may stop an individual to demand that he exhibit his license to carry a firearm, since G.L. c.140, §129C requires such exhibition on demand, on pain of surrendering such firearm into the immediate custody of the officer.

SEARCH AND SEIZURE: REASONABLE SUSPICION; POINT OF "STOP"; JUDGE NEEDN'T HERE CREDIT "UNCONTROVERTED" TESTIMONY

Sexual assaults against women were committed at a particular area (Cambridge, close to Watertown) on June 2 and on July 21 of the same year, at approximately the same time of night. The assailant was said to be a black male over six feet tall. At about that same time of night, 8:30 p.m., on September 8 of that year, a state police sergeant in a marked cruiser saw the defendant, a black male, walking in the direction opposite the sergeant's direction of travel in the same general area. He turned his cruiser around and followed the defendant, who had left the sidewalk to go down a dirt path toward an area known to him as one where homosexual men gather. The sergeant drove onto the shoulder of the road, stopped about 40-50 feet away from the defendant, got out of the cruiser, turned his spotlight on the defendant, and yelled that he wanted the defendant to come back and talk to him. The defendant obeyed, but was ordered to stop when he reached a point about 20 feet away from the cruiser. Other officers arrived; one searched the defendant's bag as the sergeant questioned the defendant, who answered questions as to his name, including his middle name, "Lee," said to match the middle name given by the assailant to one of the victims. He further told the sergeant that he lived in Cambridge, that he had taken the bus from Central Square, and that he had a criminal record including a conviction for rape; he denied that his mother was an American Indian or that he had ever used the name "Barnes" (one victim reported that her assailant told her this information). When asked whether

he would be willing to be viewed by a couple of women for identification puposes, he replied that the officer was trying to "jam him up." He was then told he was under arrest for rape. The photos subsequently taken of him were shown to the July victim, who identified the defendant as her assailant. A Superior Court judge ordered suppression of all observations, evidence, and statements, including identifications, that were derived from the defendant's arrest, on the ground that the initial encounter between the sergeant and the defendant was an illegal warrantless seizure. The Commonwealth appealed. *Commonwealth* v. *Scott*, 52 Mass. App. Ct. 486 (2001).

The Appeals Court remanded the case for further findings and rulings, with further evidentiary hearing if necessary. Only the sergeant had testified at the suppression hearing. Despite this fact, and contrary to the Commonwealth's contention, neither the motion judge nor the Appeals Court was required to accept as true his testimony unless it was expressly controverted by other evidence. (The Commonwealth's argument was fueled by appellate courts' past occasional recitation of facts found "as supplemented by uncontroverted testimony," but the Appeals Court cautioned that it was willing to do this only when confident that "the supplementary material is indeed uncontroverted[,]" which depends not only upon a lack of "contradiction" but upon the appellate court's conviction that the motion judge either explicitly or implicitly credited the witness's testimony. *Id.* at 492.) Here, a critical point was whether or not the sergeant really was able to see, as he claimed, from a distance of twenty feet in probably poor light despite the use of a spotlight, that the defendant had particular facial characteristics matching those of the assailant. Without this match, the Commonwealth was left to argue that it was reasonable to suspect the defendant to be guilty simply because he was a black male at least six feet tall with short hair was in the same general area at the same time of night as the tall, short-haired, black male rapist six weeks earlier and/or three months earlier. *Id.* at 495.

The Appeals Court did side with the Commonwealth in its contention that the sergeant's initial hailing of the defendant, from forty feet away, was not a seizure. The Court thought that a reasonable person "could well have believed he was free to leave at the time," but believed that a seizure did occur when the sergeant ordered the defendant to stop and stay when he reached a point twenty feet away from the sergeant. *Id.* at 494.

SEARCH AND SEIZURE: SCHOOL; SEARCH TRIGGERED BY TRUANCY UNREASONABLE

When a housemaster observed a student walking across the school parking lot at a time when the student should have been in class, he was told to bring his parents to school on the following school morning. When he did not do so, the housemaster issued the student a written suspension hearing letter, citing his missing class and leaving the building without permission. The housemaster called the student's mother and asked her to come to the "hearing," which was scheduled for the following morning. Although the mother appeared at the hearing, the student did not; he was suspended for three days in absentia. Shortly after the hearing ended, the student appeared at the office of the housemaster, who called in the assistant headmaster; they were joined by a Boston school police officer. The group moved to an empty classroom, and the assistant headmaster there asked if the student had any contraband in his possession. He said that he did not. The assistant headmaster then directed him to empty his pockets, which turned up a lighter and a small cigar, neither of which was contraband. The assistant headmaster next patted the student's pants legs (finding nothing), and then ordered him to remove his shoes. "Inside one of his shoes was a pair of folded socks, acting almost like a shoe liner." A small bag of marijuana was concealed within the folded socks. *Commonwealth* v. *Damian D., a juvenile*,

434 Mass. 725, 727 (2001).

Although the United States Supreme Court has exempted school searches from the Fourth Amendment's warrant and probable cause requirements, there remains the stricture that searches of students by school administrators be "reasonable." There must be a reasonable suspicion that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Contrary to the position of the headmaster here, a violation of school rules does not automatically make a search reasonable. "A violation of school rules, standing alone, may or may not provide reasonable grounds for such a search. It will depend on whether the specific facts of the violation create a reasonable suspicion of wrongdoing, the evidence of which is likely to be found in a search of the student." *Id.* at 730. Because it was "pure speculation to conclude that" a student was likely to have contraband simply because he was out of class for a period of time during the day, and because the search was for evidence of contraband, not evidence of mere "truancy," the Court ordered suppression of the marijuana. The decision was based on the reasonableness standard required by the Fourth Amendment, so the Court did not address the issue of whether article 14 of the Declaration of Rights "imposes a standard stricter than reasonableness on student searches." *Id.* at 730-731.

SEARCH AND SEIZURE: WARRANT, EXECUTION OF; 'KNOCK AND ANNOUNCE' TECHNICAL VIOLATION; NIGHTTIME PREREQUISITES?

A search warrant for drugs was executed at the defendant's home. Police, at 1:15 a.m, entered an enclosed porch which was furnished as a family room by opening its unlocked door from the exterior of the home. They did not knock or announce their presence, but proceeded to the kitchen door, which was allegedly one-third ajar. At that point, an officer knocked on the kitchen door, saying twice, "Nicky, it's the Springfield Police Department," and specifically saying that "we have a search warrant for your house." The defendant, who was lying on a sofa in the living room, purportedly responded then by telling the police to come in.

The police did violate the "knock and announce" rule by entering the enclosed porch in secret. Neither the trial court judge nor the Appeals Court granted relief, however, on the ground that the "objectives" of the knock and announce rule were "substantially achieved," notwithstanding the violation: there was no forced entry, no property damage, and no invasion of privacy (purportedly because "the police knew the defendant and he invited them in"). *Commonwealth* v. *Siano*, 52 Mass. App. Ct. 912, 914, further appellate review denied, 435 Mass. 1108 (2001). The defendant also argued that there was no justification for a nighttime search, though permission for execution of the warrant at nighttime had been granted by the magistrate approving the warrant. There are apparently **no** constraints on authorization of nighttime execution of warrants: "'[t]here is no particular statutory requirement applicable to an application for a nighttime warrant and no requirement that the magistrate state or identify the cause for issuing such a warrant,'" AND "'if the magistrate issues a [nighttime] warrant ... , he is presumed to have had cause for doing so.'" *Id.* at 915 (citations omitted).

SEXUAL ASSAULT: ADMISSION OF "SAIN" VIDEOTAPED INTERVIEW OF COMPLAINANT

In Commonwealth v. Quincy Q., 434 Mass. 859 (2001), the SJC held that a videotaped interview of the sexual assault complainant was erroneously admitted: it permitted the complainant to corroborate her own testimony and bolster her own credibility, in violation of the substance of Commonwealth v. Peters, 429 Mass. 22 (1999) (complainant may not engage in

self-corroboration and can't be allowed to testify about the details of purportedly fresh complaint). The defendant in *Commonwealth* v. *Montgomery*, 52 Mass. App. Ct. 831 (2001), sought to invoke Quincy Q., but the Appeals Court found it inapplicable. In *Montgomery*, defense counsel was the one to bring up the subject of a videotape, and proceeded to examine the complainant about inconsistencies between her assertions in that videotape and her testimony on direct examination at trial. The videotape itself was introduced a day or two later, upon the "agreement" between the trial prosecutor and trial defense counsel that each side wanted the videotape played for the jury. Defense counsel "expressly indicated" thereafter that he had no objection to the tape being entered as an exhibit. Defense counsel also heavily relied on the videotape in his closing argument to assert that the complainant's testimony was the product of coaching and was not credible. The Appeals Court held that the defendant could not "complain about corroborative details introduced as a result of his deliberate defense stratagem. *Id.* at 833. ***Practice tip.*** Despite trial counsel's inattention at trial to the point, inconsistent statements admissible as impeachment are, and should be demanded to be, segregable from "prior consistent statements" which are inadmissible hearsay. See Commonwealth v. Zukoski, 370 Mass. 23, 26-27 (1976) (prior consistent statements not admissible merely because witness has been impeached with prior inconsistent statements); Commonwealth v. Rivera, 430 Mass. 91 (1999) (witness's prior consistent statement was hearsay, and inadmissible; to come within exception [of refuting claim of "recent" contrivance], must have been made before witness had incentive to lie); Commonwealth v. Lareau, 37 Mass. App. Ct. 679 (1994) (introduction of prior consistent statement in rebuttal [after impeachment] was reversible error: motive to lie existed before allegedly "consistent" statement was made).

SENTENCING: FACTOR OF DEFENDANT'S "HONESTY"

Many cases may be cited for the proposition that a judge may not consider the alleged perjury of a defendant in imposing a sentence. In imposing sentences upon the defendant for a number of crimes involved in two separate robberies, the judge mentioned what he had "s[een] pretty clearly" in the case, including "taking the position that he did both in the motion to suppress and then turning it around and taking a different position at trial, which indicates to me that he's a lot less than honest person." The Appeals Court believed, given the context, that the judge was referring to the disparity between the defendant's written statement that was the subject of a motion to suppress and the defendant's testimony at trial. While the written statement acknowledged a premeditated plan to rob men who might approach him at a highway rest area seeking homosexual encounters, the defendant's trial testimony was that he had merely stopped at the rest area because he was "too high to continue driving," and thereafter had been so outraged and violated by ensing sexual propositions that he "concocted" the "vague plan" that he and his confederate "played by ear." A possible conclusion from the Court's holding (no relief for the defendant) was that it was not unlawful to take into consideration the defendant's refusal to accept responsibility for his actions and to instead "blame the victims" and his addiction to cocaine. The opinion actually said, however, that the statement was ambiguous and not emphasized, that the defendant's sentences were less than that recommended by the prosecutor, and that they had been upheld in a separate sentence appeal and by the trial judge, who had refused relief upon the defendant's motion pursuant to M.R.Crim.P.29 to revoke and revise the sentences. *Commonwealth* v. *Baldwin*, 52 Mass. App. Ct. 404, 409-410 (2001).

SENTENCING: RESTITUTION AMOUNT EXCESSIVE

The defendant was placed on probation for leaving the scene of a property-damage accident, and the judge entered an order that she make restitution in an amount later to be determined. Thereafter, there was a restitution hearing. It was undisputed that the witness-victim's 1984 Ford LTD Crown Victoria was a total loss after the accident in 1998. The owner testified that, in his opinion, the car was worth $2,500 at the time of the accident, but he collected $1,995 from his insurance company. He replaced the destroyed ehicle with a 1992 Buick LeSabre automobile, for which he paid $7,800. He also paid $450 to an insurance company "to register the vehicle, including the sales tax." He financed the vehicle by withdrawing money from his "Christmas Club account and paid the balance by charging it to [a] Visa credit card account." Service fees and accumulated interest charges amounted to $373.50 at the time of the hearing. The judge calculated the restitution amount ordered ($6,630.50) by adding the price of the new car, the cost to register the car including the sales tax, and the service fee and interest charges, and deducting from that total the insurance proceeds received by the victim.

Although the Appeals Court rejected the defendant's argument that the victim could recover only the "market value" of the destroyed property (here $2500), rather than "replacement cost," it held that there was no evidence that the 1992 Buick LeSabre "qualifie[d] as a reasonable substitute for the 1984 Ford LTD Crown Victoria," given that there was evidence only that the victim bought the car because it was available. At a new hearing, the victim was to be "given the opportunity to substantiate that the 1992 vehicle was an automobile comparable in kind, quality, and condition to the 1984 vehicle." *Commonwealth* v. *Hastings*, 53 Mass. App. Ct. 41, 43 (2001).

SEXUAL ASSAULT: FRESH COMPLAINT (NOT)

Eight to nine years after she was allegedly sexually assaulted over a period of a year and a half by the defendant, a sixteen-year old female told her mother about the assaults. Thereafter, she told a school employee and a police officer. The defendant filed a motion in limine prior to trial to preclude fresh complaint testimony; the prosecutor responded to the effect that he realized that no out-of-court allegation was admissible as fresh complaint given the time lapse, but that he would "merely ... ask the mother whether her daughter gave her information and what the mother did as a result of receiving that information," and that there would be "no recitation of what was said." According to the Appeals Court's opinion, "[d]efense counsel accepted that resolution." On appeal, the Court rejected new defense counsel's arguments that the complainant should not have been permitted to testify that she had told police her story, and that it was "in as great detail" as her testimony in court. "Because neither the victim nor her mother repeated the specifics of the allegations made against the defendant, the testimony 'was not fresh complaint testimony that triggered the need for limiting instructions. It was merely testimony 'about the fact that [a complaint had been made] ... about a sexual assault' and not as to any details of the assault.'" *Commonwealth* v. *Wentworth*, 53 Mass. App. Ct. 82, 92 (2001) (citations omitted).

SEXUAL ASSAULT: FRESH COMPLAINT ON VIDEOTAPE INADMISSIBLE; TESTIMONY VOUCHING FOR COMPLAINANT'S CREDIBILITY

The parents of a five-year-old child videotaped the child answering questions posed by them and by the defendant's mother concerning the child's allegations of sexual assault. At the defendant's trial for those sexual assaults, the videotape was introduced. This was error under Commonwealth v. Peters, 429 Mass. 22, 27 (1999): a complainant may not "corroborate" herself, and this would happen if she were allowed to testify about the details of purportedly

fresh complaint. The Court refused to find that the videotape here was merely cumulative. Because it showed the complainant's manner and speech at that time, as well as the encouraging and supportive responses from the other persons present, it "could serve only to enforce [the complainant's] credibility." *Commonwealth* v. *Quincy Q., a juvenile*, 434 Mass. 859 (2001).

The SJC also held that the complainant's father's testimony as to "fresh complaint" was inadmissible in several particulars. He should not have been allowed to testify that he had told the defendant's mother to come to their home and talk to the complainant, and "she'll tell you the truth.... If you can leave the house and not believe her, I'll rethink what I'm thinking." *Id.* at 873. The Court rejected the Commonwealth's claim that the testimony was necessary to explain how or why the videotape of the child's "fresh complaint" was made. The father's testimony that during a conversation with the child, she "just clammed up" and "[y]ou could see in her eye ... that she didn't really want to talk" was also inadmissible. While a fresh complaint witness may testify to "details of the complaint as expressed by the complainant," the witness "may not interpret the complainant's words." *Id.* at 874-875. Finally, the father's emotional response and state of mind after his daughter's revelations were flatly irrelevant, and should not have been admitted. In this case, the father testified that he had told a coworker, "who could see that something was wrong," and that he was too upset to work. *Id.* at 875.

SUBPOENA: PRIVILEGE AGAINST SELF-INCRIMINATION

A former member of the Commission on Judicial Conduct received a subpoena compelling him to testify and produce documents about potential judicial misconduct and his own conduct as a member of the Commission. He refused to comply with the subpoena, citing his privilege against self-incrimination under both the Fifth Amendment and article 12 of the Declaration of Rights. An SJC single justice and the full bench held, however, that he had to testify: whatever he had done violated only an internal confidentiality policy, and this was not a "crime." See G.L. c.211C, §6 (1), mandating confidentiality regarding all proceedings of the Commission. A statute cited by the respondent, G.L. c. 279, §5, was merely one which "addresses the appropriate punishment for *crimes* where punishment has not been designated by statute," but this did not "create criminal liability where none exist[ed], and consequently, [could]not operate to render the respondent's noncriminal violation criminal." *In the Matter of the Enforcement of a Subpoena*, 435 Mass. 1, 4 (2001). The Court also rejected the argument that the respondent might be prosecuted for "conspiracy," even while acknowledging that the definition of conspiracy is broad, and that the "crime of conspiracy [is] not restricted to arrangements having [a] criminal objective or contemplating [the] use of criminal means to accomplish [a] lawful objective [.]" *Id.* at 5, in a parenthetical describing Commonwealth v. Gill, 5 Mass. App. Ct. 337, 340 (1977). Because the purported wrong by the respondent concerned only "internal" Commission proceedings and confidentiality, it did not "cause prejudice to the general welfare or oppression of the individual of sufficient gravity to be injurious to the public interest," 435 Mass. at 5. For this reason, the respondent's testimony and document production did not place him at risk of a conspiracy prosecution. *Id.*

TRIAL PROCEDURE: 'PUBLIC' TRIAL RIGHT; INDIVIDUAL VOIR DIRE OCCURRING IN SPACE OTHER THAN COURTROOM

The defendant and the Commonwealth joined in requesting individual voir dire in a murder case. The judge allowed the request, and used a vacant jury deliberation room for the individual voir dire. Present during the individual voir dire were the individual juror being questioned, the judge, the clerk, the defendant, counsel, the court reporter, and one or two court

officers. There was no objection to this procedure by trial counsel, but appellate defense counsel claimed that it had deprived the defendant of his right to a "public" trial. The SJC acknowledged that individual voir dire should be conducted in open court. *Commonwealth* v. *Horton*, 434 Mass. 823, 831 (2001). "In light of the defendant's consent to the procedure, his presence throughout the voir dire, and the fact that the less public setting for the voir dire in all likelihood helped rather than harmed the defendant," the Court found no prejudice to the defendant "from the setting in which this voir dire was conducted." *Id.* at 833. Prior to that pronouncement, the opinion asserted that "the defendant has not demonstrated that he has standing to press this right of the public." *Id.*

TRIAL PROCEDURE: REVERSAL FOR ALLOWING COMMONWEALTH TO SUPPLEMENT ITS PROOF AFTER MOTION FOR REQUIRED FINDING OF NOT GUILTY

The defendant was charged with distribution of cocaine, second offense (G.L. c.94C, §32A(d)), and with possession of cocaine with intent to distribute, second offense (G.L. c.94C, §32A(b)). A jury convicted him of "the substantive portions of both indictments," and then the "second offense" portion of the indictment charging possession with intent to distribute was tried by the same jury. *Commonwealth* v. *Zavala*, 52 Mass. App. Ct. 770, 771 (2001). During that phase, the Commonwealth presented evidence from a police officer that in 1990, he had "arrested Victor Zavala, born June 26, 1964, on charges of possession with intent to distribute and conspiracy." The prosecutor then placed in evidence documents verifying that Victor Zavala had been convicted of possession with intent to distribute a Class B substance, and the Commonwealth rested. The defendant also rested, and argued for a required finding of not guilty: the Commonwealth had failed to produce any evidence that the defendant here, Victor Zavala, was the same person who had been arrested and convicted in 1990. Instead of ruling on the defendant's motion, the trial judge allowed the Commonwealth to reopen its case and introduce the missing evidence, and then denied the defendant's motion for required finding. Whatever "discretion" a trial judge has to allow reopening, it cannot be used to defeat to allow the Commonwealth to overcome a required finding of not guilty. "To hold otherwise would allow the Commonwealth always to be able to repair its case after both sides had rested, therefore reducing rule 25(a) to a nullity." *Id.* at 779.

YOUTHFUL OFFENDER: UNAVAILABLE FOR "ASSAULT AND BATTERY", BUT APPROPRIATE FOR ASSAULT AND BATTERY BY MEANS OF DANGEROUS WEAPON ("SHOD" [SNEAKER] FEET); "BIRTHDAY" RULE OF WHEN AGED 17

Less than two hours before the date of his seventeenth birthday, the defendant allegedly hit on the head someone who was being kicked by several other individuals. The defendant was arrested three days later, and was prosecuted subsequently as a "youthful offender," charged with assault and battery and assault by means of a dangerous weapon, to wit, "shod foot." He was convicted of both crimes, but argued on appeal, for different reasons, that neither conviction was valid. He succeeded in his argument that the crime of assault and battery could not be the foundation for a "youthful offender" indictment. The statutory basis for youthful offender indictments, G.L. c.119, §54, provides that the Commonwealth may proceed by an indictment against a person between the ages of fourteen and seventeen if the person is alleged to have committed a criminal offense which, if the person were an adult, would be punishable **by imprisonment in the state prison**. Because assault and battery is punishable by either

imprisonment for not more than two and one half years in a house of correction or by a fine of not more than five hundred dollars, the "youthful offender" indictment was fatally flawed: the conviction and sentence were vacated and the indictment was ordered dismissed. *Commonwealth* v. *Ulysses H.*, 52 Mass. App. Ct. 497, 501-502, further appellate review denied, 435 Mass. 1105 (2001). The Court directed that, "[i]n future cases, when both indictable and nonindictable offenses arise out of the same criminal conduct, the Commonwealth should join the complaint with the indictmen and proceed to trial before a twelve-person jury on all charges. See G.L. c.119, §54." *Id.* at 501 n.7.

As to the ABDW (shod foot) indictment, the defendant argued that at the time of the crime he was already seventeen years of age, and thus was ineligible for prosecution as a youthful offender. This argument depended on adoption of the "common law" rule of age (previously applied in Massachusetts on occasion), by which one "attains his ... next age on the day **before** the anniversary of his ... birth." *Id.* at 499 (citations omitted). By reference to a related statute, G.L. c.119, §72(a), second paragraph, which utilized the phrase "offense prior to his seventeenth birthday," the Court held that a straight "birthday" rule applied, and that the defendant had not yet reached age seventeen on the day before his birth date. *Id.* at 500-501. (Even if the Court had held that the youthful offender indictment could not stand, he could have been prosecuted as an adult. *Id.* at 500 n. 5.)

See also *Commonwealth* v. *Quincy Q., a juvenile,* 434 Mass. 859 (2001), summarized at ***JUVENILES: YOUTHFUL OFFENDER; THREAT/ INFLICTION OF SERIOUS BODILY HARM MUST BE PROVEN BY COMMONWEALTH BEYOND REASONABLE DOUBT***.